

Committee: Social Policy Scrutiny
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Tabled By: AESD

Signed: [Signature] **Written Response to Questions from the Social Policy Scrutiny Committee**
Inquiry into the Independent Commissioner Against Corruption Bill 2017
Caroline Heske¹

Opening Statement

1. I am a Senior Policy Lawyer with the Department of Attorney-General and Justice (AGD). I have been asked to give evidence as a witness in this Inquiry.
2. Creating the ICAC has been a joint project between the Department of the Chief Minister (DCM) and AGD, with DCM tasked with matters of budget and implementation, and AGD tasked with developing the legislation. As the action officer for AGD for the ICAC project, I was tasked with preparing drafting instructions for a Bill to progress implementing 50 of the 52 Recommendations of the *Anti-Corruption, Integrity and Misconduct Commission Inquiry – Final Report* by Commissioner Martin AO QC. I then worked with the Office of Parliamentary Counsel to prepare the Bill. My work has been done under the supervision of the Director of Policy Coordination, Mr Robert Bradshaw. Together, we also conducted internal and public consultation during the development of this Bill.
3. My background is that I joined AGD almost 15 years ago and was admitted to practise as a lawyer in 2004. I initially worked as a prosecutor for the NT DPP, and then as a Lecturer in Law at Charles Darwin University, where I taught Evidence Law, Criminology, and Introduction to Law and Legal Process. I returned to a Government role in 2009 to develop the education and training regarding the *Public Interest Disclosure Act*, which commenced in 2010. Apart from a six month stint as Acting Director of the Anti-Discrimination Commission, I was a senior investigation and complaints officer at the Commissioner for Information and Public Interest Disclosures until taking my present position in Legal Policy. I have been the Acting Information Commissioner and Acting Public Interest Disclosure Commissioner. During my time with the Commissioner for Public Interest Disclosures, I have conducted a number of investigations, including investigations into NT Correctional Services, NT Police, and a regional council.
4. In developing the ICAC Bill in accordance with instructions, I have been conscious of the need to create legislation that will work in the Territory context. Each Australian jurisdiction that has an anti-corruption body has a different model. Even where models are similar, they can work very differently in practice. For example, when the Commissioner for Public Interest Disclosures was established it was expected, based on comparisons with Tasmania which was a similarly sized jurisdiction, that it would receive 1-10 disclosures a year. It has in fact received something closer to 70 disclosures a year. In my experience, the kind of corruption reported and the volume of reports received depends on the culture and attitudes of the community, the culture and attitudes within public bodies, and the reputation of the anti-corruption body, not on the details of the legislation itself. This is particularly true in the Territory, which has a close-knit community where much information passes by word of mouth.
5. The aim in developing this Bill was to equip the ICAC with sufficiently flexibility, power, and discretion to be able to target its resources effectively, given that in a jurisdiction this size, it will necessarily be a smaller body when compared to some of its interstate equivalents. This has led to a number of choices in the Bill:

¹ Caroline Heske is my maiden name and the name I use professionally. However, my legal name is Caroline Norrington.

- as recommended by Commissioner Martin, the ICAC has a very broad discretion to decide which matters it will and will not investigate, so long as it prioritises the most serious, sensitive, and systemic corruption;
 - the ICAC's jurisdiction is defined broadly to allow the ICAC to proceed with confidence, rather than becoming bogged down in technical legal challenges as to whether it has jurisdiction to investigate a particular matter, as such challenges could require a significant diversion of the ICAC's resources away from actually investigating corruption; and
 - provided that persons meet a strict vetting process, the ICAC has considerable flexibility with respect to staffing and structuring the Office, which will enable it to make the best use of available resources, and to make staffing arrangements that avoid conflicts of interest, if and when these arise.
6. I thank the Social Policy Scrutiny Committee for providing me with the following questions to consider and to provide a response. In answering these questions I have referred to submissions made to the Committee and published on the Committee's website, notably a number of submissions made by distinguished experts in law and in the conduct of anti-corruption investigations.

Question 1a

The Hon Bruce Lander QC notes that 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. What consideration has been given to how the definitions in Clauses 10-15 might be simplified in order to encourage prompt reporting?

7. This issue was raised and considered during the development of the Bill. The view was taken that people who are deciding whether to report improper conduct in the Territory rarely look at the actual words of the legislation. Rather, the decision whether to report is based on other factors, such as whether the person feels the conduct is sufficiently improper, whether the person feels an obligation to report, whether the person fears repercussions, and whether the person is aware of or referred to avenues to report improper conduct.
8. It is usual for bodies that receive complaints to publish websites, pamphlets, and guidelines in plain English (and appropriate translations) for people to decide whether to make a complaint. These are the materials that prospective complainants tend to refer to when seeking information about whether a complaint can be made.
9. It is also usual for anti-corruption and complaint handling bodies to operate a confidential 1800 number and a general enquiry email address through which prospective complainants seek confidential or anonymous clarification as to whether a complaint can be made. I would expect the NT ICAC to adopt these usual practices, which will form the chief source of information for persons in deciding whether to report. Clause 129 of the Bill requires information to be published on the website.
10. A side note with respect to clause 129(f) is that I notice a typographical error appears in the Bill as introduced. I think this must have been introduced accidentally during final revisions as previous versions refer to 'guidelines issued under section 105' rather than 'section 0'. The

second subclause (f) should of course be subclause (g) and the remaining subclauses should be renumbered accordingly.

11. More specifically, with respect to public officers, the ICAC is obliged under Clause 22 of the Bill to establish a system for mandatory reporting. This requires the ICAC to issue directions and guidelines governing the reporting of improper conduct by public bodies and public officers. This will allow the ICAC to develop guidelines and directions with examples and language tailored to different kinds of public bodies. My experience as a legal educator is that the most effective way to explain a legal test is with concrete examples that they can relate to. Even shorter and more simplified sections of legislation can be difficult to read for people who are not lawyers or do not otherwise have much experience with legislation.
12. Under Clause 95, the ICAC is also required to issue directions and guidelines for dealing with protected communications (whistleblower disclosures) and under Clause 105, the ICAC is also required to issue guidelines for public bodies and public officers regarding responding to whistleblowers. The ICAC can audit compliance with these guidelines. According to the *Whistling While They Work* project,² a world leading research project into public interest whistleblowing focused on Australian jurisdictions, the most pervasive obstacles to reporting relate to the reporting climate within organisations. Legislation that is not sufficiently comprehensive, or that is overly complex in the sense of requiring a whistleblower to identify and jump through bureaucratic hurdles can also be a barrier. Clauses 10-15 provide a comprehensive and broad jurisdiction which allows the ICAC and organisations to promote a simple 'if in doubt, report' culture within public bodies and the broader Territory community.
13. From the whistleblower's perspective, the Bill involves minimal red tape hurdles, and sets in place a framework to ensure public bodies take responsibility for creating a pro-reporting culture, and for the ICAC to have the tools to check and enforce this is occurring via audits and public reports on the adequacy of a public body's compliance with the best practice guidelines.
14. Further, Clause 93 provides an important safeguard which enables the ICAC to protect a whistleblower who may have made a good faith report that is not strictly in compliance with the legislative procedure. This represents a 'common sense' approach to encourage whistleblowing, one with some structure to help protect evidence and keep the identities of whistleblowers confidential, but one that does not require a whistleblower to be a legal expert. It provides an important stopgap to address the issue the Hon Bruce Lander QC is referring to. In some jurisdictions, there is no equivalent to clause 93, and so it is possible that a misreading of the Act could lead to someone making a report of corruption that turns out not to be protected because it does not technically fall within the ICAC's jurisdiction. Under this Bill, such technical missteps can be cured at an early stage by the ICAC.
15. The primary objective in drafting the definitions in the Bill itself has been to create comprehensive and specific provisions that will allow the ICAC to confidently assess whether a report is a matter within its jurisdiction. Such assessments are made by experienced officers with expertise in anti-corruption legislation. The clauses in question are intended to provide a comprehensive checklist for an experienced assessor to work through in order to determine whether a matter falls within jurisdiction, and to advise a prospective whistleblower accordingly.

² See particularly *Whistling While They Work: A good-practice guide for managing internal reporting of wrongdoing in public sector organisations* by Roberts, Brown and Olsen, from p36. Available online at <<http://press-files.anu.edu.au/downloads/press/p144611/pdf/book.pdf>>

16. In other words, the function of clauses 10-15 is to provide a comprehensive, technical definition of the ICAC's jurisdiction. They are designed as part of a framework that supports an 'if in doubt, report' communications message to be delivered through a range of plain English materials. Clauses 10-15 are not intended to be used as the communications tool to convey that message, and it is respectfully submitted that attempts to simplify them to make them a more effective communications tool would risk undermining the breadth and precision that supports effective whistleblower protection, which in turn is essential to encourage reporting.

Question 2

With regards to encouraging reporting by members of the public, it is noted that while the ICAC has an educative function, this would seem to be primarily directed at public bodies and public officers.

- a) How will the remit of the ICAC be communicated to the general public?***
- b) Has any consideration been given to the inclusion of a requirement that the ICAC provide advice and develop educative resources to increase the community's awareness about standards of conduct, propriety and ethics in public authorities?***
17. The Bill provides that it is a matter for the ICAC how it will communicate its remit to the general public, but I refer to my remarks in paragraphs 8 and 9 about usual practices.
18. That said, it is apparent that the ICAC has a general function to conduct education and training. Even though the default position is that the ICAC will conduct investigations in private, the ICAC also has the ability to engage with the public for the purpose of education and public awareness through public inquiries and public reports. In particular, the Bill contains the following clauses relevant to communication with the general public:
- one of the ICAC's functions is 'developing and delivering education and training' (at Clause 18(1)(c)), and another is 'making public comment' (at Clause 18(1)(v));
 - the ICAC has capacity to conduct public inquiries (see Part 3, Division 6). Experience in New South Wales in particular has illustrated that this can be a very effective way of communicating the ICAC's remit to the general public. Schedule 1 of the Bill contains a list of factors relevant to determining whether to conduct a public inquiry that relevantly include:
 - the desirability of the public sector being open and accountable to the public;
 - the benefit of exposing improper conduct to public scrutiny; and
 - the educational value and benefit to research and policy development of sharing details of matters about which the ICAC has particular knowledge;
 - the ICAC has the capacity to make a number of different kinds of public reports which illustrate its functions and activities to the public (see Part 3, Division 7), and it is presumed that some of the ICAC's investigations would result in prosecutions in courts that are open to the public, where evidence of the investigation would be given;
 - the ICAC must produce an annual report which is tabled in the Legislative Assembly (Clause 127);
 - the ICAC must issue and publish a range of guidelines as discussed in my answer to Question 1a; and

- the ICAC must maintain a website (Clause 129) on which it is required to provide ‘an explanation of how to make an allegation of improper conduct to the ICAC’ as well as collate and make available a range of other public information about the ICAC.
19. These clauses authorise and encourage the ICAC to engage in public communication and education to an extent that is consistent with its other functions. In my view, adding an additional requirement of the kind proposed in the question would be unusually prescriptive and at odds with the principle of giving the ICAC the discretion to target its resources most effectively. However, that is ultimately a matter of policy.
 20. There are additional specific provisions aimed at education for public officers because the mandatory reporting scheme applies particularly to public officers, and public bodies and public officers have additional obligations under the Bill. For example, with respect to managing whistleblowers. They therefore have special educational needs beyond the needs of the general public.

Question 3

Professor Aughterson notes that the nature and breadth of the matters that can be categorised as ‘corrupt conduct’ and investigated by the ICAC could give rise to uncertainty and injustice. In NSW, the Court of Appeal has stated that labelling conduct as ‘corrupt’ where apart from the Act, it would not normally attract that description is misleading, and in that context, gives rise to injustice.

- a) ***Subclause 10(2)(c)(vi) includes as ‘corrupt conduct’ conduct that has an adverse effect on the effective performance of official functions without the need for any element of dishonesty or what would normally be considered corruption. Why is this included in the definition of corrupt conduct?***
21. The definition of corrupt conduct at Clause 10 aims to reproduce the substance of the definition recommended by Commissioner Martin at paragraph [149] of his report, as specified by Recommendation 12 of that report. The first category of corrupt conduct in his proposed definition is very broad, namely it is conduct:

...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...
 22. The true breadth of this proposed category of corrupt conduct can only be appreciated in light of the High Court’s decision in *Independent Commission Against Corruption v Margaret Cunneen & Ors* [2015] HCA 14 (‘the Cunneen case’). In that case, the court was asked to consider a similar test under section 8(1)(a) of the *Independent Commission Against Corruption Act 1988* (NSW) legislation, which provides that corrupt conduct includes:

(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...
 23. In the *Cunneen* case, the New South Wales ICAC argued that it could investigate anyone whose actions affected the ‘efficacy’ of a public official carrying out their functions. The facts concerned members of the public allegedly concocting a plan to lie to a police officer about having chest pains in order to thwart a random breath test. The question before the High Court was whether the ICAC had jurisdiction to investigate conduct that merely affected the ‘efficacy’

of the police officer's functions, or whether it was necessary that the conduct affected the 'probity' of the police officer carrying out those functions. In other words, the High Court was considering whether an element of dishonesty or 'corruption' in the sense posed by the Committee in Question 3a was required. The High Court found that the section as worded did not include conduct that merely affected the 'efficacy' of the police officer's function. Some kind of interference with 'probity' was required.

24. It is therefore of significance that Commissioner Martin's proposed definition borrows closely from the New South Wales wording, but amends that wording to include conduct that affects the 'honest or impartial or *effective* exercise of official functions' [my emphasis]. This definition is proposed after Commissioner Martin discusses the *Cunneen* case and resulting amendments in various jurisdictions, and in particular says:

[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.

25. While paragraph [146] only discusses dishonest conduct which affects efficacy, the definition proposed at paragraph [149] is not limited to dishonest conduct. It is constrained only by a requirement to prove that the conduct affecting the efficacy is either an offence punishable by two or more years' imprisonment, or grounds for termination of service. In light of the significance and impact of the *Cunneen* case, and the extensive consideration given by Commissioner Martin to considering issues around scoping the definition of corrupt conduct it seemed that the inclusion of 'effective' functions in the proposed definition was a deliberate choice by the Commissioner. Our starting point was therefore to reproduce this test in the legislation.
26. However, consideration was given to whether this definition overreached, and some modifications were made as a result. In particular, there was a concern that the provision as worded meant that members of the public who interacted poorly with a public officer in a manner that resulted in a criminal offence being committed were committing 'corrupt conduct'. This would include every drunk or mentally impaired person who assaulted police while resisting arrest, for example. While not diminishing the seriousness or unpleasantness of such conduct, we took the view that investigating such conduct was not the intended purpose of an ICAC and that other bodies were more appropriately tasked with dealing with such incidents. Therefore, the 'efficacy' test was retained only for public officers. With respect to members of the general public, the Bill gives the ICAC jurisdiction to investigate a number of offences in Part IV of the Criminal Code, which are offences specifically dealing with government corruption (see Clause 10(5) of the Bill).
27. The test at Clause 10(2)(c)(vi) is already broader than the category the committee is querying at Clause 10(2)(iv). If the Committee wishes to depart from Commissioner Martin's recommendations due to concerns about the breadth of Clause 10(2)(iv), an amendment to subclause (iv) is likely to be ineffective without addressing the breadth of subclause (vi).
28. I appreciate that Professor Aughterson's point as taken up by the Committee in this question is a concern is that the term 'corrupt conduct' carries a sting that is typically not associated with conduct that is merely ineffective, even if it is ineffective to the point that it results in

termination of service. I do not disagree with this statement. However, I suggest that this issue is one of terminology rather than the scope of the definition. The main function of the definition of corrupt conduct in Clause 10 is to define the ICAC's primary jurisdiction. Matters of improper conduct that fall outside Clause 10 (and are not serious anti-democratic conduct) are required to be referred unless there is a good reason not to, whereas the ICAC has complete discretion to investigate any conduct in Clause 10. It is open to the Committee to propose an amendment to remove the 'sting' of such conduct being labelled 'corrupt' by adopting a different terminology for some or all of the conduct listed in Clause 10, without changing the content of the ICAC's primary jurisdiction (which is specified by Clause 18(3)).

29. With respect to whether conduct not involving dishonesty should be within the ICAC's primary jurisdiction, I have one more point to make for the Committee's consideration. Regrettably, whistleblower allegations do not usually come wrapped up in a nice package with all the evidence attached so that a case for investigation for 'dishonesty' is clearly established. People committing corruption obviously attempt to hide what they are doing. However, there are usually warning signs and irregularities. Those warning signs and irregularities are things like a pattern of breaching policies and procedures. The person will typically have a range of explanations for such deficiencies which do not involve deliberate dishonesty. It is very difficult to obtain the evidence to establish that the irregularities are a result of dishonest conduct rather than merely inept conduct without an investigation. Narrowing the definition of corrupt conduct as proposed by this question would limit the ICAC's ability to uncover corruption. It would place any investigation conducted into such matters and any subsequent prosecution at risk of a challenge that the ICAC had acted *ultra vires* (out of power), resulting in issues such as prosecutions that cannot proceed or convictions quashed on appeal. This is a risk if the definition were to be narrowed.

Question 4

It is further noted that the scope of some of the subclauses in the clause 10 definition of 'corrupt conduct is unclear.

- a) ***In the absence of a definition, what is meant by failure to manage 'adequately' an actual or perceived conflict of interest (subclause 10(2)(ii)), and how is adequacy to be assessed?***
 - b) ***Similarly, can you explain what the term 'inappropriate' means regarding 'inappropriate conduct in relation to official information' in subclause 10(2)(v)?***
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30. It is common and necessary to define the jurisdiction of anti-corruption bodies in broad terms with a fair degree of abstraction. This is because these bodies investigate a very wide range of public bodies, public officers, and kinds of improper conduct. Broad and general tests such as 'breach of public trust' or 'adversely affects the honest or impartial performance' are typical.
 31. For example, section 4 of the *Corruption, Crime and Misconduct Act 2003* (WA) defines the primary jurisdiction of the Western Australian Corruption and Crime Commission to include:
 - (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;
 32. The legislation leaves the term 'corruptly' broad and undefined.
 33. These tests not only concern a broad range of behaviour, but involve terms that implicitly require an assessment of whether conduct is inappropriate. For example, where legislation suggests that a body can investigate conduct that is 'involves the ... partial exercise of any of his

or her official functions',³ that is a test that requires some interpretation. In one sense, everyone is partial when they make decisions, because they are required to decide which option or side they prefer. But this is not what is meant. What is meant is that the person is partial in the sense of have acted despite an inappropriate conflict of interest. Further, must have been a conflict of interest that was inadequately managed by the standards expected of a public officer of that kind, in accordance with law, policies, procedures, and directions. In practice, the question for an investigator when considering whether a public officer's behaviour involved the 'partial exercise of any of his or her official functions' is more specifically a test about whether the public officer failed to appropriately manage a conflict of interest.

34. A potential ambiguity in the test of whether a person is 'partial' is whether conflicts of interest include only actual conflicts of interest, or perceived conflicts of interest, which can be much broader. In an effort to offer clarity on this point, the definition at clause 10(2)(c)(ii) explicitly states that both actual and perceived conflicts of interest are relevant. I would submit this subclause is therefore at least as clear, if not more clear, than equivalent interstate tests. It offers clarity while adhering to the substance of the definition proposed by Commissioner Martin.
35. I would also suggest that clause 10(2)(c)(iv) is not as vague as Professor Aughterson implies in his advice. The word 'inappropriate' in that subclause must be read in context. In particular, it is in a list of types of conduct that refer to breaches of rules, policy, and lines of authority. I feel confident that a court would not interpret the term 'inappropriate' as some abstract test which allows an ICAC to impose some kind of personal moral notion of what is 'inappropriate' upon public officers in order to investigate them for corruption. Such an interpretation would be extraordinary, and impossible to sustain in view of the intention and nature of the legislation. A purposive approach to legislation that looks at the words to be interpreted in context is a well-established principle of statutory interpretation: *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355. The term 'inappropriate' therefore necessarily turns on establishing what is appropriate and inappropriate behaviour for a particular public officer by reference to codes of conduct, workplace policies, and directions given by persons in authority. It is implicit that someone must have a legal duty not to behave in a certain way before that conduct could be classified as 'inappropriate' for the purpose of a clause such as 10(2)(c)(iv).

Question 5

Mr Brett Walker SC raises concern regarding the application of clause 12 to Members of the Legislative Assembly, noting that subclause 12(3) excludes judicial officers in the performance of judicial functions from falling within 'unsatisfactory' conduct.

- a) ***Why does subclause 12(3) of the Bill exclude conduct by a judicial officer in the performance of judicial functions from 'unsatisfactory conduct'?***
 - b) ***Why does the Bill not make similar provisions for Members of the Assembly?***
36. Recommendation 16 of the Commissioner Martin's report required that judicial independence and parliamentary privilege be maintained. However, this Recommendation was made in the context of other recommendations that required that all persons, including Members of the Legislative Assembly and judicial officers, be subject to the investigation by the ICAC for 'corruption, misconduct or maladministration in public administration or for offences under the *Electoral Act* (NT)'. Striking an appropriate balance between these competing considerations was one of the challenges in creating the ICAC Bill.

³ Section 8(1)(b) of the *Independent Commission Against Corruption Act 1988* (NSW).

37. Subclause 12(3) is in part about maintaining judicial independence. However, perhaps more critically, it also recognises that there is already a well-established public forum for complaining about judicial officers who make decisions that would fall within the definition of 'unsatisfactory conduct', namely the appeals process. One of our primary concerns was that if judicial officers were not excluded from the definition of unsatisfactory conduct, the ICAC would become a default secondary 'appeals process' for court decisions. Noting that the ICAC can still investigate judicial officers for corrupt conduct and misconduct, that judicial officers perform judicial functions publicly in most circumstances, and that the model proposed by Commissioner Martin was intended to leverage existing organisations where these were available, we considered subclause 12(3) to be an appropriate inclusion.
38. The Bill does not explicitly carve out a similar exemption for Members of the Assembly in relation to their conduct of the business of the Legislative Assembly, because it is well established that this is carved out by the parliamentary privilege conferred on the Legislative Assembly by sections 6 and 12 of the *Northern Territory (Self-Government) Act 1978* (Cth) in the absence of any explicit statutory provision limiting parliamentary privilege.
39. Section 82 sets out the circumstances in which parliamentary privilege is limited – namely, to allow a whistleblower to disclose improper conduct without needing to obtain complex legal advice to determine whether the disclosure is a potential breach of parliamentary privilege. Section 82 makes it clear that the ICAC is effectively unable to progress investigating an allegation that would breach parliamentary privilege. It does not displace parliamentary privilege, hence the ICAC is not able to obtain access to confidential records of Members carrying out the business of the Legislative Assembly, nor is it able to criticise Members for their conduct in carrying out the business of the Legislative Assembly.
40. The exemption Clause 12(3) carves out for judicial officers does not include judicial officers performing administrative functions. For example, if there were to be systemic rorting of travel entitlements in the courts resulting in substantial misuse of money, this would be a matter the ICAC could look at, notwithstanding Clause 12(3), as it is not about judicial officers performing judicial functions, but rather 'administrative' functions. Likewise, it is anticipated that the ICAC may wish to investigate such administrative matters involving Members of the Legislative Assembly, as examination of such accounts are not about investigating a Member for their conduct of the business of the House. However, the Bill does not permit the ICAC to suggest that a Member is engaged in unsatisfactory conduct because the MLA constantly breaches the Standing Orders in a way that demonstrates incompetence or negligence. By definition, if the Member's unsatisfactory conduct is regulated by the Standing Orders, then it is a matter for the Legislative Assembly and beyond the scope of the ICAC's jurisdiction.
41. There is one notable difference between MLAs and judicial officers. Judicial officers do not simultaneously hold roles as judicial officers and as the executive authority over government departments. By contrast, a number of MLAs hold dual roles as MLAs and Ministers. I would suggest that, outside of a situation such as rorting of entitlements or electoral offence matters, MLAs who are not Ministers are unlikely to be the subjects of an ICAC investigation.
42. Ministers are in a different category because they have the power to make substantial decisions about the expenditure of public money, to issue legal authorisations and exemptions, and to make these decisions behind closed doors with limited avenues of appeal. Unlike judicial officers, who are able to structure their affairs to avoid politics, Ministers by definition are constantly engaged in a political environment, and their continuing employment depends on securing sufficient stakeholder approval. They are therefore a tempting target for stakeholders

interested in obtaining government contracts or authorisations. While parliamentary privilege only protects an MLA in their capacity as an MLA, and not as a Minister, this can sometimes be a difficult line to establish, which can cause significant practical complications for carrying out an effective investigation. Any additional protections to protect Members of the Legislative Assembly need to be carefully considered with respect to the practical impact they may have with respect to the limiting the ICAC's ability to appropriately investigate a Minister, and the ICAC's ability to investigate persons who might attempt to pressure a Minister to engage in corrupt conduct.

Question 6

Mr Walker advises that, for abundant caution, the Legislative Assembly should be expressly excluded from the definition of 'public body'.

a) Is there any reason why the Legislative Assembly should not be expressly excluded from the proposed definition of 'public body'?

43. The policy intention was to exclude the Legislative Assembly from the definition of a 'public body', because it is not really a public body for which a particular individual is responsible and so the general provisions relating to public bodies would be difficult to apply to the Legislative Assembly.
44. I have read Mr Walker SC's analysis, and would add to his comments that the Legislative Assembly is a body established by the *Northern Territory (Self-Government) Act 1978* (Cth). This is a Commonwealth Act, and the section 17 of the *Interpretation Act* specifically provides that an 'Act' means a Territory Act. The Legislative Assembly therefore cannot be a 'public body' by virtue of Clause 16(1)(f).
45. I agree with Mr Walker SC's conclusion that it is unlikely to be a body that receives, directly or indirectly, public resources as defined by Clause 16(1)(l). My understanding is that it is individual Members and the Department of the Legislative Assembly that receive funding, not the Legislative Assembly as an entity, and there is no real possibility that the Legislative Assembly as an entity could be understood to receive funding, as it is not the kind of legal entity that can receive funding *per se*. I suggest that the answer to this question would be more within the expertise of the Clerk of the Legislative Assembly. But if my understanding is correct, an amendment would not be necessary.
46. If I am wrong, or the Committee were to form a contrary view, it would be a simple matter to make an amendment that explicitly excludes the Legislative Assembly. However, any such exemption should be carefully worded to avoid encroaching on the ICAC's ability to investigate MLAs and other public officers involved in the affairs of the Legislative Assembly.

Question 7

As Professor Aughterson points out, being subject to investigation by a body such as ICAC will have serious implications for the person under investigation, both personally and in the public perception.

a) What is the benefit in subjecting persons to an ICAC investigation for conduct which, in the case of a public servant, would not necessarily warrant dismissal?

47. Before answering this question, I think it is important to point out that while the definitions at Clauses 10-15 do serve the purpose of defining what the ICAC can and cannot investigate, they have a second important function: namely, they define what kind of allegations can be a

protected report by a whistleblower. The breadth of those definitions has an essential function in ensuring people can and do report improper conduct. If the jurisdictional definitions are narrowed, this will not only narrow what the ICAC can investigate, it will narrow whistleblower protections.

48. Current protections in the *Public Interest Disclosure Act* protect whistleblowers who report conduct such as ‘substantial maladministration’, even though that conduct does not necessarily warrant dismissal of an individual. Section 5(1)(b) of the *Public Interest Disclosure Act* protects whistleblowers that report substantial misuse of public resources, and conduct that is unreasonable, oppressive, or improperly discriminatory, among other things. The protection is acquired irrespective of whether the allegations would justify dismissal of the public officers involved. In developing this legislation, our starting point with whistleblower protection was to retain the level of protection and general design of the scheme in the *Public Interest Disclosure Act*, and then to consider how this could be refined and improved based on feedback we sought about its current workability. When we sought submissions regarding the *Public Interest Disclosure Act*, responses were strongly in favour of ensuring protections were broad, so long as there were adequate safeguards against malicious and vexatious disclosures. Broad definitions of reportable conduct are considered an important part of an effective whistleblower protection regime.⁴
49. Turning to the question itself, I would make two points:
- there are numerous situations where conduct can be of great public concern even though it does not warrant dismissal; and
 - it is a question of policy whether the negative personal effects of an investigation outweigh the potential positive contribution to the public interest of an investigation in these circumstances.
50. With respect to the first point, there are significant categories of matters of serious public concern where an investigation by an ICAC can be in the public interest, even if the allegations would not satisfy a legal test that the matter warrants dismissal of a public officer.
51. With respect to Members of the Legislative Assembly, using dismissal as a threshold test would result in excluding the ICAC from investigating anything but criminal conduct by Members. The legal grounds on which a Member can actually be declared ineligible and dismissed from their position are slim. In practice, the primary mechanism by which such a person is held accountable and ‘dismissed’ from their position is a complex system of popular opinion, expressed through votes and party politics. The only way the public or a party is in a position to hold a Member accountable for corrupt conduct that is not criminal conduct is if the public is aware of what the Member has done. In practice, if the ICAC is not responsible for investigating such conduct, it may remain unexposed, or alternatively will be the subject of less

⁴ See, for example, the criteria by which a team of international experts assessed the whistleblower protection frameworks of various jurisdictions as part of the G20 Anti-Corruption Implementation Plan (2015-16): *Breaking the Silence: Strengths & Weaknesses in G20 Whistleblower Protection Laws* by Wolfe et al (<https://blueprintforfreecspeech.net/wp-content/uploads/2015/10/Breaking-the-Silence-Strengths-and-Weaknesses-in-G20-Whistleblower-Protection-Laws1.pdf>). The first 3 criteria are: 1) broad coverage of organisations, 2) broad definition of reportable wrongdoing; and 3) broad definition of whistleblowers. The broad definition of reportable wrongdoing is further defined to mean: ‘Broad definition of reportable wrongdoing that harms or threatens the public interest (eg. including corruption, financial misconduct and other legal, regulatory and ethical breaches).

impartial investigations by vested interest groups without the tools to obtain the evidence to get at the full truth of what occurred, or the impartiality to present it fairly.

52. The other notable situation where dismissal is not a good threshold test is where something has gone very wrong, but it has been a team effort, and the evidence is not able to establish that a particular individual is responsible to an extent that warrants dismissal. Everyone has a reasonable story that someone else is to blame. For example, supposing an incident involving serious harm to public health and safety were to occur in relation to a facility or service under government control. There may be hints that the matter may have involved corruption but no evidence hard enough to warrant assessing the matter as corrupt conduct. Similarly, suppose a large amount of government money were to go missing in a situation that looked like a repeated computer error. Maybe there are rumours that certain public officers with access to the system have mysteriously acquired unusually large assets, but the picture is not clear enough to establish corruption at the outset. Maybe these rumours will turn out to just be rumours, and the issue will turn out to be an external hacker or even a computer glitch, or maybe the investigation will reveal deliberate fraud by public officers. This cannot be known until the matter is investigated. Even if every public officer is innocent, there is a benefit in doing the investigation in that uncovering the truth of what occurred will enable the ICAC to make recommendations to avoid it happening again.
53. The secondary issue is whether it is justifiable to conduct an investigation into allegations of this nature, given the potential personal impact on the subject(s) of the investigation.
54. It is a very fair point to make that ICAC investigations can be both personally stressful and can potentially result in reputational damage. However, I would draw the Committee's attention to the following features of the Bill and policy considerations which I believe are relevant to this issue:
 - The ICAC would only investigate a matter of this nature in situations where there is a good reason not to refer the matter. Clause 18(3) requires the ICAC to give priority to dealing with matters that may involve corrupt conduct or serious anti-democratic conduct. The conduct described in this question is misconduct or unsatisfactory conduct, which the ICAC is required to refer unless there is a good reason not to refer.
 - Good reasons not to refer could include, for example, that the matter is seriously detrimental to the public interest and there is no referral entity with jurisdiction or capacity to investigate the matter, that the usual referral entity is conflicted (eg. the allegation relates to senior management of the referral entity itself), or that the ICAC is conducting a related investigation into corrupt conduct and it will provide a more complete picture of that corrupt conduct to investigate this improper conduct. These reasons would not be applicable in most matters, but they function to fill gaps that would otherwise exist in the Territory's accountability framework. It seems unlikely that the ICAC would choose to spend its resources on less serious investigations in the absence of these kind of good reasons.
 - If the ICAC is noticeably not adhering to the requirements of Clause 18(3), it can expect to be the subject of complaint by the Inspector, and adverse findings by the Inspector (see Part 7 Division 4).
 - The ICAC is required to deal with matters in private, unless it is in the public interest to do otherwise. Item 5 of Schedule 1 of the Bill sets out key factors that are relevant

to making this decision. These include at (e) 'the risk that a person may suffer undue hardship, including undue prejudice to a person's reputation'.

- Even during a public inquiry, the ICAC has capacity to hear part of inquiry in private, to exclude persons from the inquiry, and to make non-publication orders (see Clause 46).
- The structure of the reporting system in the Bill (which I will explain further in my answer to Question 15) aims to allow the ICAC to make recommendations regarding issues that have been identified in an investigation without the need to make public reports that could cause unnecessary reputational damage. Public reporting need only occur where the public interest outweighs other factors, for example in a situation where a public body refuses to address corruption the ICAC has identified, and public scrutiny is needed to ensure action is taken.
- In its powers, the ICAC is not very different for the most part from a body like Police. The ICAC does have powers to require people to give evidence, which Police do not have. On the other hand, Police have a power to arrest people which the ICAC does not have. Police are able to investigate persons for relatively low-level conduct, which can have a personal impact. However, this low-level jurisdiction of Police relates to matters such as drunk and disorderly conduct and traffic infringements, whereas the jurisdiction of the ICAC relates to what might be described as white collar misconduct. It is a matter of policy what kind of matters warrant intrusions on personal liberty by law enforcement bodies with powers such as the Police or an ICAC. Similar policy tensions arise in both scenarios, although with Police the intrusion tends to be deprivation of liberty and the shadow of criminal sanctions, whereas with the ICAC the intrusion is a requirement to attend and answer questions and the shadow of career or reputational repercussions.
- Similarly, the kind of stresses involved in being investigated by the ICAC are similar to those faced by persons who must give evidence or face charges in the criminal justice system. Such persons include those charged with relatively minor matters, and vulnerable witnesses such as child victims of sexual assault. It is a well-established feature of the criminal justice system that it is considered justifiable to subject individuals to these kind of stresses in order to ensure that conduct that is severely detrimental to individuals or the public interest is deterred, and that allegations of such conduct are properly scrutinised.

Question 8

The East Arnhem Shire Council has raised concerns regarding the potential impact ICAC referrals may have on the financial and human resources of public bodies.

- a) If the ICAC refers a matter to a public body and gives directions on how the referral is to be dealt with, how will the implementation of those directions be funded?***
- b) What recourse does a referral entity have if it considers the directions from the ICAC require an inappropriate prioritisation of its resources?***
- c) Is there any reason why subclause 18(4) could not be expanded to provide that it is a good reason for the ICAC not to refer a matter to another entity if doing so 'may adversely affect the performance or future performance of the other entity, particularly a public body'?***

55. As discussed in my opening statement, my role in this project has been to assist in developing the Bill. The Department of the Chief Minister is tasked with making decisions regarding implementation. I am not in a position to advise how the Government proposes to deal with the funding implications of referred investigations, and my role is to ensure the workability of the Bill is not contingent on particular funding arrangements, which may not be constant over time.
56. From the perspective of developing the Bill, Recommendation 30 of the report by Commissioner Martin clearly provided that the Bill should give the ICAC the power to refer matters to public bodies and to give directions to those public bodies as to how investigations were to be conducted.
57. At the end of the day, an investigation must be conducted and funded by someone or the matter will not be investigated. All of the potential bodies that might carry out the investigation ultimately do so using government funding. I am unaware of whether any financial analysis has been done as to whether an investigation by the ICAC or a public body is likely to be more resource intensive. It is likely to vary on a case-by-case basis. Advantages to the public body conducting its own investigation is that it may be able to be done less formally and hence with less of the personal impacts identified by Professor Aughterson in the previous question, that the organisation's internal investigation may be conducted by people with more intimate knowledge of the working environment in which the allegations arose (significant, for example, in a specialist environment like a hospital), and that it may encourage the public body to take ownership of the issues identified through the investigation. The ICAC's role in relation to such a referred investigation can assist in ensuring that the investigation has the credibility of external oversight, and in providing support and guidance to the public body's investigator. The ICAC may also be aware of other investigations and potential prosecutions, and assist the public body to conduct the investigation in such a way that avoids interfering with those other matters.
58. The ICAC has no direct power to force a public body to comply with a referral or follow its directions with respect to a referral. Rather, the pressure the ICAC can bring to bear is to threaten to make a public report on the inadequacy of the public body's response (see answer to question 15 with respect to the nature of a 'report concerning referral'). This is envisioned to provide an incentive for the public body, relevant Ministers, and potentially the ICAC to negotiate a reasonable scope to the investigation and reasonable allocation of resources. The recourse a referral entity has if it considers that the directions require an inappropriate prioritisation of resources include:
- entering into discussions with the ICAC to negotiate more reasonable directions;
 - refusing to comply on the basis it is not in a position to comply; and
 - applying for additional funding.
59. Given that we do not yet know what funding will be available in the future, the Bill as drafted provides a framework which encourages reasonable discussions and negotiations, which is a common sense approach to resolving resourcing issues.
60. The suggestion by East Arnhem Regional Council to amend Clause 18(4) was considered during the public consultation process prior to the Bill's introduction, but not adopted. The reasons why it was not adopted were:
- It is unnecessary. The ICAC is already obliged to consider the range of factors in Schedule 1 with respect to exercising its discretion. These factors relevantly include

‘the impact of the ICAC’s activities on the ability and capacity of public officers and public bodies to perform their functions, especially if those functions involve critical or front-line services’.

- There was not a compelling reason to elevate this factor above the other important factors set out in Schedule 1 by including it in Clause 18(4).
- Leaving the factor in the Schedule was more consistent with Commissioner Martin’s recommendation that the ICAC have a ‘wide and unfettered discretion’ to refer matters and give directions to the public body as to the conduct of an investigation (as per Recommendation 30).
- The Bill is premised on the assumption that the ICAC is to be a very experienced person capable of making reasonable decisions in a wide range of sensitive situations. There is no reason to suppose that the ICAC will not do so in relation to referred investigations.
- Public bodies are ultimately responsible for ensuring improper conduct is not occurring within their organisation. It is not unreasonable in principle to expect public bodies to allocate resources to investigate and deal with allegations that improper conduct occur internally.
- The proposed addition to Clause 18(4) is so broad that it would allow public bodies to challenge any referral on the basis the ICAC has good reason not to refer the investigation. The reality is that investigating allegations requires resources and causes stress to witnesses and suspects, which in turn at least temporarily disrupts workplace environments. This means that it could be argued that any referral ‘may adversely affect the performance or future performance’ of the referral body’. This proposed provision could be used to block a referral, even when the disruption would be justifiable in the public interest or ultimately result in improvements to the public body’s processes. At best, this would be unproductive. At worst, it could be used by a corrupt public body to delay or avoid an investigation.

Question 9

Mr MacSporran QC notes that the Bill does not provide any Corporations law displacement provisions for the purposes of section 5G of the Corporations Act 2001 (Cth), and to enable Government Owned Corporations as ‘public bodies’ to lawfully comply with mandatory reporting obligations despite constraints imposed by section 1317AE of that Act.

a) Is there any reason for this omission?

61. Section 1317AE of the *Corporations Act 2001* (Cth) is part of a whistleblower protection scheme aimed at protecting corporate whistleblowers. It prohibits providing information about a corporate whistleblower on to another person. The provision potentially interferes with the ICAC’s ability to investigate a public body that is also a corporation, as it may restrict access to evidence about the corruption, which may also be corruption or connected to corruption being investigated by the ICAC.
62. Section 6(1) of the *Government Owned Corporations Act* (‘GOC Act’) is such a displacement provision.

63. However, that Act only applies to a limited number of corporations established under the GOC Act, namely the Power and Water Corporation, the Power Generation Corporation (T-Gen), and the Power Retail Corporation (Jacana). Section 6(1) does not displace the constraints imposed by section 1317AE of the *Corporations Act 2001* (Cth) with respect to corporations created under other Territory statutes, or corporations registered under the *Corporations Act 2001* (Cth) that public bodies may own (I understand some Local Government Councils have created corporations of this nature). Then there is of course the issue that the definition of public body can include contract service providers and grant recipients who may be corporations.
64. As Mr MacSporran QC suggests, it may be helpful for the Committee to consider amending the Bill to provide a broader corporations law displacement provision with respect to corporations which are statutory bodies, or contract service providers which are created and owned by public bodies, irrespective of whether these are Government owned corporations created under the *Government Owned Corporations Act*.
65. Such a displacement provision requires consultation with the Commonwealth and the other States and the ACT.

Question 10

Pursuant to subclause 23(2), Mr Walker notes that the ICAC cannot audit or review the practices, policies and procedures of a court or judicial officer in relation to the performance of judicial functions.

a) Can you explain why the same concern for institutional integrity is not extended to the Legislative Assembly and its Members?

66. It is my view that parliamentary privilege protects the institutional integrity of the Legislative Assembly and its Members to an equivalent degree. I refer to my answer to Question 5.

Question 11

Mr Lander raises concerns that the Bill's compulsive powers are not scaled to the gravity of the matter being investigated.

a) Why does the Bill provide the power to compulsorily examine a person or search premises, to be used for the investigation of a matter which is not criminal in nature and indeed might only be low level misconduct?

67. Recommendation 12 of the report by Commissioner Martin specified that the ICAC should have the ability to investigate such matters in certain, limited circumstances. Recommendation 37 specified the powers that the ICAC should have to conduct its investigations. The list of powers specified explicitly included coercive interviews and the power to obtain search warrants to search private premises. Commissioner Martin did not indicate that there should be any scaling of powers depending on the gravity of the conduct being investigated. I have assumed the reason for this is that the jurisdiction of the ICAC is structured so that it is only investigating 'low level misconduct' if there is a good reason. I have given examples in my answer to Question 7 of the kind of serious matters the ICAC might investigate beyond corruption, notwithstanding that the allegations do not (or cannot be proven to) have involved high end misconduct by any one individual.
68. As a general rule, when coercive powers are given to law enforcement bodies, they are given generally, not scaled. This is true even though it is understood that the law enforcement body will investigate a broad range of conduct, from the most serious criminality through to relatively

minor matters. For example, section 117 of the *Police Administration Act* authorises police to obtain search warrants in relation to an investigation into any kind of offence – there is no requirement that the investigation be into a serious crime.

69. I can also offer some background information to put Mr Lander's views on this point in context. As the South Australian ICAC, Commissioner Lander operates under the *Independent Commissioner Against Corruption Act 2012* (SA) ('SA ICAC Act'). Under that legislation, his jurisdiction as the ICAC is confined to investigating offences (see definition of 'corruption in public administration' - section 5 of the SA ICAC Act), primarily for the purpose of producing prosecution briefs. He can also look at misconduct and maladministration, but he is not permitted to exercise the ICAC's coercive powers to do so, he must rather adopt the power of an inquiry agency, which means in practical terms that he would do something like use the powers of the South Australian Ombudsman (see also section 36A of the SA ICAC Act).
70. In making his Recommendations, Commissioner Martin has clearly made a conscious decision to depart from the South Australian model. While Commissioner Martin proposes a tiered system, he does this with respect to prioritising matters, not with respect to the ICAC's powers. He cites the South Australian definitions of misconduct and maladministration as model definitions for the lower tiers (which in the Northern Territory Bill are called misconduct and unsatisfactory conduct respectively). However, he departs from this model and chooses something closer to the broader New South Wales and Victorian definitions of 'corrupt conduct'. In both those jurisdictions, the ICAC equivalents can exercise coercive powers of the kind critiqued here to investigate a broad range of non-criminal corrupt conduct. In fact, in New South Wales, a search warrant may be issued by the ICAC itself merely on the basis that the ICAC 'thinks fit in the circumstances' on 'reasonable grounds' (see s 40 of the *Independent Commission Against Corruption Act 1988* (NSW)).
71. In my view, the South Australian approach would cause some challenges in the Territory, bearing in mind the comparative size of the jurisdictions and resources available. The South Australian approach requires staff of the ICAC to be trained in how to correctly exercise powers under multiple statutory frameworks, and for the ICAC to develop multiple investigation processes and record-keeping systems in order to comply with the different frameworks. This represents a significant additional burden and substantially increases the risk of powers being exercised incorrectly.

Question 12

Mr MacSporran notes that the provisions of subclause 80(2) will likely prevent the ICAC from properly examining persons charged with offences for legitimate purposes concerning the improper conduct of others, which may well be contrary to the public interest.

- a) ***Has any consideration been given to the inclusion of provisions similar to section 331 of the Crime and Corruption Act 2001 (Qld) which provides a robust mechanism to allow CCC investigations to proceed and to examine any witnesses, including those charged with an offence, in closed investigation hearings?***
72. This question raises a sensitive issue of policy, as well as some complex legal points. It may therefore assist if I provide a summary of the background to the issue that section 331 of the *Crime and Corruption Act 2001* (Qld) and subclause 80(2) of the Bill are intended to address. It is the same legal issue, but the Bill and the Queensland legislation have taken different policy positions.

73. These provisions concern the privilege against self-incrimination. Recommendation 17 of Commissioner Martin's Report stated that 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.'
74. The privilege against self-incrimination, colloquially known as the 'right to silence' has been described as a fundamental human right, and abrogation of it is not something that is done lightly. It exists to protect individuals from overreaching of state power, as such overreaching has historically amounted to tyranny through corruption. However, given that anti-corruption investigations exist also to protect individuals and the public from corrupt state power, as a matter of policy a different balance is typically struck. As Commissioner Martin notes at paragraph [414] of his report, abrogating the privilege against self-incrimination is an 'essential tool in the armoury of an anti-corruption body'. ICAC-like bodies are therefore permitted to conduct coercive questioning of witnesses on the condition that that evidence cannot be used against the witness in a subsequent criminal proceeding.
75. This leads to a conundrum: what do you do if the witness confesses to the ICAC where they hid the smoking gun? The privilege against self-incrimination says you cannot use that answer to prove to a criminal court that the witness committed a crime. But if the ICAC goes and gets the smoking gun, and it is covered in the witness' fingerprints, can the prosecution lead the gun itself in evidence in a criminal trial? The common law position is no.
76. However, typically, ICAC-like bodies have legislation that allows it. Commissioner Martin clearly endorses it, noting that if 'following those useful lines of inquiry ... are prohibited, potentially much of the work of the Commission will be wasted' (see para [439]). However, he then turns to a discussion of where to draw the line – what if the witness reveals an offence unrelated to the one under investigation, for example? He declines to answer that question, noting it is a 'difficult question of policy' (para [441]).
77. There is another grey area that Commissioner Martin does not touch on at all, which is the area raised by this question. It is known as the 'companion rule' or 'companion principle', and it comes into play at the point the accused is charged with an offence. The companion rule is what section 331 of the *Crime and Corruption Act 2001* (Qld) is intended to deal with.
78. The companion rule is that the prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof (see *Lee v The Queen* [2014] HCA 20 at [31]-[33]; *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 21 at [35]-[39]). The companion rule arises from the principle that a criminal trial is accusatorial, and the onus is on the prosecution to prove the guilt of the accused. Hence, if your legislation takes away the accused's right to silence at interview, to protect the fundamental accusatorial nature of a criminal trial, you must ensure some kind of safeguards are enacted to ensure that you are not compelling an accused to assist the prosecution.
79. Recently, the High Court has clarified that the companion principle becomes engaged at the point when a person is charged with an offence: *R v Independent Broad-based Anti-corruption Commissioner* [2016] HCA 8, para [48] ('IBAC case'). At this point, the judicial process becomes 'engaged'. The High Court describes this as 'fundamental' to our criminal justice system.
80. The difficulty I have with the Queensland provision is that, from what I can see, there has not been a High Court case confirming the constitutional validity of a statutory provision like section 331 of the Queensland legislation, which displaces the companion principle post-charge. Of significance, the full court unanimously said in *Lee v The Queen* [2014] HCA 20 at para [32]:

32. Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in *X7*. The principle is so fundamental that "no attempt to whittle it down can be entertained" albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.
81. When I read the transcript of the IBAC case, the questions suggested to me that the High Court entertained the case because they were interested in settling questions of law around the companion principle. Ultimately arguments about constitutional validity were not relied upon because the facts of the case concerned questioning pre-charge. Academics have made the argument that it follows from the High Court's recent decisions that the accusatorial principle is a fundamental due process principle that may be guaranteed by Chapter III of the Constitution (see, for example, *Criminal Due Process and Chapter III of the Australian Constitution* by Professor Anthony Gray, The Federation Press (2016)). The High Court has accepted that the Parliament cannot make a law which would require or authorise a court 'to exercise judicial power in a manner which is inconsistent with the essential nature of a court or with the nature of judicial power': *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1. The Australian Law Reform Commission has noted that in recent times the High Court has made statements that indicate it may be moving towards ruling that procedural fairness is guaranteed as a constitutional right.⁵ In the criminal law context, such a doctrine could bring into doubt the validity of a provision such as section 331 of the Queensland legislation, which could be read as interfering with a judicial process post-charge in a way that would undermine the accusatorial nature of the proceeding and hence the inherent nature of a criminal court.
82. Clause 80(2) was therefore drafted to prohibit questioning a witness at the point they are facing criminal proceedings, which is typically when charges have been laid. This was to ensure that ICAC investigations were conducted in a way that ensured that will be constitutionally valid if the High Court continues to move in the direction some are anticipating they will move.
83. Further, I note that if clause 80(2) was to be abandoned and replaced with an equivalent to section 331 of the Queensland legislation, it would prevent the ICAC from referring information of significant public interest, which would be a problem in the Territory context, as further explained in my answer to question 30.

⁵ *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127)*, para [10.33]

Question 13

Clause 5 of schedule 1 includes a number of matters that are to be taken into account when determining whether a public hearing should be held.

a) Why doesn't the Bill include a statutory prescription in relation to public / private hearings?

84. I apologise if I have not understood the question, but I would submit that the Bill does include a statutory prescription in relation to public / private hearings in Clause 5 of Schedule 1, which provides as follows (my emphasis):

5 *Matters should be dealt with by the ICAC in private, unless it is in the public interest to do otherwise, taking into account the following:*

(a) the desirability of the public sector being open and accountable to the public;

(b) the benefit of exposing improper conduct to public scrutiny;

(c) the extent to which allegations of improper conduct are already in the public domain;

(d) the extent to which allegations of improper conduct raise issues of continuing public interest;

(e) the risk that a person may suffer undue hardship, including undue prejudice to the person's reputation;

(f) the needs of persons who have assisted in identifying or investigating improper conduct and particularly the need to protect information that may identify those persons;

(g) any views expressed by persons who would be affected by a decision whether to handle a matter in private or public;

(h) the educational value and benefit to research and policy development of sharing details of matters about which the ICAC has particular knowledge.

85. This reflects Recommendation 35 of Commissioner Martin's report, which requires a presumption that investigations are private unless that presumption is displaced in the public interest. The Recommendation was that this be done by reference to a list of relevant factors.

86. If the question is why are these factors in a Schedule rather than the main clauses of the Bill, that was for because it was to provide an easy and comprehensive reference of all the relevant factors to be considered every time the ICAC exercises a discretion. Provisions in a Schedule have as much legal force as provisions in the numbered clauses of the Bill, and require a vote of the Legislative Assembly to amend, similarly to the main Clauses, as they are not Regulations but part of the Bill proper.

Question 14

Professor Aughterson notes that despite the provisions of subclauses 46(a) and (c) there is still potential for self-incriminating evidence to emerge at a public hearing which could be particularly damaging in a relatively small community.

a) Why doesn't the Bill include provisions requiring the ICAC to advise witnesses of a right to request that at least some of their answers to questions may be given in closed session?

87. Section 80(3) of the Bill provides that a witness at an open session is entitled to refuse to answer questions on the ground that the evidence might tend to incriminate the witness in relation to an offence that is not materially relevant to the alleged improper conduct that the ICAC is investigating. Further, section 80(4) guarantees a right to put submissions to the ICAC about whether section 80(3) applies in a closed session.
88. If the question is why is the ICAC not specifically instructed to issue a 'caution' of the type found in section 140 of the *Police Administration Act*, it was not considered necessary. ICAC public inquiries are very different from police interviews, where a person can be arrested in the middle of the night in a remote location and 'put on the spot'. ICAC public inquiries require notice, and interstate experience would suggest they are high profile matters where witnesses tend to obtain more than ample legal representation to advise them of their rights.
89. The ICAC is required to issue guidelines and practice directions for ICAC staff as to the manner in which functions under this Act are to be performed (see Clause 128) within the first 2 months of operations. It would be usual to develop guidelines and sample scripts to be used by investigators when questioning witnesses, and templates for issuing notices to witnesses, and for these to take into account matter such as advising witnesses of their rights where this is applicable. In developing these guidelines, the ICAC must take into account the factors in Schedule 1, which relevantly include the matters set out in my answer to question 13, as well as:
- acting and being seen to act fairly and impartially; and
 - not interfering with an individual's rights, privileges or privacy, beyond what is reasonably necessary to carry out the ICAC's functions effectively.
90. However, if the Committee considers that it would be preferable if there was a specific requirement on the ICAC to advise a witness in a public inquiry of the right in clause 80(3), there is no real reason why an amendment to this effect could not be made. This could be done by amending clause 41 to require the notice to mention this right, and/or inserting a section requiring a witness to be advised of the right before giving evidence in a public inquiry.

Question 15

Mr Lander notes that the reports that may be made and have to be made under Part 3, Division 7 may lead to confusion in the manner in which the ICAC (NT) deals with investigations into criminal conduct.

a) Can you explain the purpose of the different types of reports?

91. The reports can be thought of as a range of tools that are available to the ICAC to use in different situations or for different purposes. They are not mutually exclusive. Different kinds of reports can be issued in relation to the one investigation at different stages or for different purposes.
92. A **brief of evidence** (clause 50) is used when the ICAC wishes to pass on evidence for the purposes of investigation of an offence, prosecution of an offence, or disciplinary action against a public officer. This could be done at the conclusion of an investigation or at any point during an investigation. These are all private processes and indeed sometimes it will be appropriate to use clause 50 covertly, that is without notifying the person being investigated that they are under investigation. There is nothing unusual or improper about this. Suspects are not usually notified they are under investigation until a case is sufficiently advanced, even if multiple agencies are exchanging information in order to conduct the investigation. The purposes for which the evidence can be passed on under this section are all processes which are required to accord a person natural justice, if and when they progress to the stage of a charge or hearing.
93. An **investigation report** (clause 49) is used to make findings and reach conclusions in relation to whether improper conduct occurred. This would be used to close an investigation or part of an investigation. Because formal adverse findings may be made which carry at least a reputational sting, there is a requirement to accord a person who is may be subject to adverse findings a reasonable opportunity to address them. Investigation reports can be thought of as similar to the kind of report you might see from a body like the Ombudsman NT, or as the reports issued by the New South Wales ICAC about their investigations. Investigation reports under section 49 are not automatically issued publicly. This is to allow the report to communicate its findings and reasoning fully and frankly to the public body (or public bodies, or managing public officers) responsible for addressing the problems. This reasoning could include very sensitive adverse information about individuals that it would be neither fair nor necessary to make public, or which might prejudice a prosecution. The exception to this general presumption against non-publication is a report regarding an MLA. This is because, unfortunately for MLAs, such issues can only be dealt with by the Legislative Assembly, in processes that are traditionally public. As noted in the Bill, where appropriate, the investigation report may contain recommendations made under clause 55.
94. **Recommendations** (clause 55) are used to require steps to be taken to address or prevent improper conduct. Recommendations may be made as part of a report under clause 49, and this would be a logical way for the ICAC to use recommendations, as it makes sense to provide guidance as to steps to be taken to deal with the issues identified by an investigation. However, the Act separates this power from the investigation report to give the ICAC the flexibility to make recommendations as an alternative to investigation. In my experience as an investigator, it is frequently the case that you identify at an early stage where things went wrong, even if you are not yet able to pin it on a particular individual.
95. For example, I once investigated a matter involving hundreds of wrongful uses of corporate credit cards. The culprits had clearly been using the credit cards to buy snacks. The problem was that there was a very large pool of people who had been passing around the credit cards, and no evidence to connect any particular person with a particular purchase. It was likely that even a very resource-intensive investigation would not yield any evidence to target a particular individual. Everyone involved had basically been instructed they had a right to use the cards in this way, and the managers responsible for telling them this were no longer with the organisation. There was no possibility of recovering the money. All that could be done was suggest to the public body that it take steps to ensure that it could not happen again. What clause 55 allows is for this to be made promptly as a formal recommendation which can be formally followed-up and escalated to a higher authority if not addressed, without the need to

conduct a full investigation (given such an investigation was likely to be a waste of resources in the circumstances, and simply cause a delay). This reflects that the ICAC's purpose is actually to ensure corruption is prevented or dealt with, not to conduct investigations *per se*.

96. A **report concerning recommendations** (clause 57) is used to make public the failure of a public body or public officer to adequately implement recommendations within a reasonable time. Clause 57 is both an incentive to public bodies to take responsibility for dealing with improper conduct, and a means of raising public awareness as to the issues when that incentive fails to produce results. My experience with the *Public Interest Disclosure Act* is that the threat of this kind of report is a very strong incentive for public bodies to take prompt, sensible action. It is in this report that the ICAC would make public the details of a private investigation, to the extent necessary to achieve the objectives of deterring or dealing with improper conduct, bearing in mind the factors in Schedule 1. The ICAC can also make a report concerning recommendations to improve compliance with the whistleblower protection scheme under clause 110.
97. A **report concerning referral** (clauses 52 and 53) is used to resolve a dispute regarding a referral. As implicit in the submission from East Arnhem Regional Council (see question 8), the ICAC and a referral body may have a difference of opinion as to whether a referral is appropriate. If this dispute cannot be resolved, it is escalated first to the responsible Minister (clause 52), and if that fails to the Assembly (clause 53). This was considered to be the appropriate escalation chain for what is essentially a dispute about resourcing and who has responsibility for what.
98. A **general report** (clause 47) can be used to make public issues that are of general concern. The report can contain details about specific investigations but is not required to do so, and again the ICAC is required to weigh the public interest factors in Schedule 1 in determining how much information to disclose. General reports are limited to systemic issues, because where an incident is a serious one-off incident of bad behaviour by an individual, that can be dealt with (and is arguably more appropriately dealt with) via a usual criminal or disciplinary process. In addition to systemic issues, the ICAC can raise operational issues of public interest in a general report, such as resourcing issues or other matters that are seriously impairing or may seriously impair its effectiveness. It can also publish the results of its audits where this is appropriate.
99. A **public inquiry report** (clause 51) is used to communicate the outcome of a public inquiry. I should note here that there is a common misconception that a public inquiry is an alternative to an investigation. This is not conceptually correct. A public inquiry is a tool that can be used in an investigation. It may constitute the whole investigation or only a small part or 'phase' of an investigation.
100. A **public statement** (clause 54) is used to authorise the ICAC to speak publicly about a range of miscellaneous matters. For example, if the ICAC wished to call for people to come forward with evidence, or to reassure the public that action is being taken in relation to an issue even if the full nature of the investigation cannot be disclosed.

Question 16

Mr MacSporran questions the appropriateness and timing of the mandatory procedural fairness requirement in relation to subclause 49(2) investigation reports:

- a) ***Is there any reason why subclause 49(2) reports could not be treated in a similar way to the briefs of evidence given to law enforcement agencies or disciplinary authorities under clause 50?***

101. I understand that the issue Mr MacSporran is identifying is that the ICAC may wish to communicate with a public body about a range of issues without alerting the subject of the investigation, and he is concerned that subclause 49(2) does not allow this to occur, because it requires the person to be notified of adverse material.
102. I would respectfully submit that the Bill already provides solutions to this situation in other provisions.
103. Firstly, if there is a need to communicate with the public body so that they can take urgent appropriate action this can be done by making recommendations under clause 55. This clause not only authorises but requires the ICAC to provide information to assist the public body to understand why the recommendations have been made and what they are intended to achieve. As discussed in the explanation of a 'recommendations' in the answer to question 15, the power to make recommendations was separated from the process of providing an investigation report to address exactly this situation.
104. Secondly, if some or all of the allegations are to be transferred to the public body because it is an appropriate body to investigate them, this can be done using the referral power in clause 25. Clauses 26-29 enable a reasonable flow of information to allow this to occur effectively. A joint investigation is also possible under clause 38.
105. Thirdly, if witness protection action is necessary, this can be done directly without making an investigation report. Clause 106 allows the issuing of a direction to protect persons from retaliation, and providing reasonable information as to the reason for the direction would be necessarily incidental to exercising this power. In fact, Clause 106(3) requires that this consultation occur. The ICAC can also make recommendations to improve management of the risks of retaliation under clause 110, and may make witness protection arrangements under clause 111.
106. Finally, the ICAC may make a general report under clause 47 privately to the public body to alert it to systemic issues, or matters that are obstructing the ICAC.
107. Outside of these situations, or providing a brief of evidence, it is difficult to see what legitimate purpose the ICAC could have for communicating information regarding the investigation to the public body.
108. I would therefore submit that removing the requirement of procedural fairness from subclause 49(2) is unnecessary and risks creating substantial unfairness to individuals. What distinguishes an investigation report from these other communications is that it reaches formal findings and conclusions about what occurred. It would be unfair if such formal findings were made about a public officer to their manager or CEO without even giving the public officer the opportunity to respond or put a case, or for such formal findings to exist without their knowledge. Removing the right of procedural fairness would:
 - contravene administrative law principles of natural justice and procedural fairness that could result in the ICAC's findings being challenged as being legally invalid;
 - sit poorly with the privacy principles in the *Information Act*, which provides that a person has a right to know what information the government holds about them, subject to some limited exceptions.

Question 17

Mr Lander further notes that since an investigation report could include a report on an investigation into conduct that is criminal, the person of interest would need to be accorded procedural fairness.

a) This would seem to contradict other provisions in the Bill and would be a most unusual result for an investigation into criminal conduct. How might this impact on the operation of the ICAC?

109. There is no requirement to produce an investigation report as a result of an investigation. It is one optional tool available to the ICAC. Consistent with the principle of giving the ICAC flexibility and broad discretion to deal with alleged improper conduct, the ICAC may decide to handle the matter by providing a brief of evidence for prosecution, and either not providing an investigation report, or delaying the investigation report (or, indeed, the investigation) until after the criminal proceeding is complete, once it can be seen if any residual issues remain that were not dealt with in that proceeding.
110. That said, as Mr Walker SC notes in his advice submitted by the Hon Madam Speaker to this Inquiry at para [21], a situation can give rise to both criminal and administrative proceedings:

...as illustrated by *Obeid*, a breach of public trust may be criminal, as well as constituting civil illegality which the civil courts of law are bound to consider in appropriate cases, as well as no doubt constituting conduct unbecoming a Member or perhaps even a contempt of Parliament, as adjudged by the House. These multiple characters are not unknown to the law, public or private. They do not constitute any objection in principle, in my opinion, against ICAC being required to apply such standards in appropriate cases before it.

Question 18

It is noted that the Bill does not include any provisions regarding the minimum standards for disclosure of material to accompany a subclause 49(2) investigation report or a clause 50 brief of evidence.

a) In the interests of promoting accountability and transparency for subsequent decisions regarding prosecution or disciplinary proceedings has any consideration been given to including minimum standards of disclosure?

111. With respect to an investigation report under clause 49, if adverse findings are made, the common law imposes requirements that such decisions are only made after according a person with natural justice and procedural fairness. This involves providing reasons as to why the decision was made. I would suggest it would be unhelpful to set some kind of minimum standard beyond this, as there may be many competing considerations that would require omitting information from the report. Such considerations may include protecting a whistleblower, protecting other investigations, protecting investigation methodologies, and protecting confidential personal or business information that is unnecessary to disclose.
112. With respect to providing a brief of evidence under clause 50, as discussed in question 15 the purpose of such a brief is in the nature of an exchange of intelligence and evidence. It could occur at any stage of the investigation, because one of the purposes is to hand the evidence to allow it to conduct further investigation. For example, the ICAC may be investigating a person and find evidence that relates to an unsolved murder. It would not make sense that the ICAC

ought to investigate the murder further to determine how strong the murder case is before providing that information to NT Police. It is not the ICAC's role to investigate murders and it would not be appropriate for it to keep the information and not disclose it to police.

113. It would also be strange to impose a minimum standard for briefs of evidence, when clause 18(3) requires the ICAC to refer a mere allegation (which may be accompanied by very minimal evidence) to a referral body.

Question 19

With the exception of public inquiry reports, the Bill does not include any expressly stated power for the ICAC to make general comments or findings. Mr MacSporran points out that this would substantially limit the grounds upon which reports may be challenged to fairness, independence and public interest.

- a) Is there any reason as to why the clause 49 power might not include a broader express power to comment or make findings with respect to matters directly related to non-public inquiry reports?***

114. This appears to be a sensible addition to clause 49 to minimise the risk of unnecessary challenges. Essentially, this could be accomplished by including in clause 49, subclauses equivalent to subclause 51(3), which would then require the corresponding limitations of subclause 51(4).

Question 20

Mr Lander comments that clause 49 apparently allows the ICAC to make a finding that a person has committed a criminal offence, which would be contrary to the common law.

- a) Why isn't there a limitation on the type of findings the ICAC can make under clause 49 similar to those in subclause 51(4)?***
b) In the absence of such a limitation, what prevents findings under clause 49 having a prejudicial effect on any subsequent criminal or disciplinary proceedings?

115. I am not sure I agree that clause 49 authorises the ICAC to make such a finding given that, as Mr MacSporran QC points out, it does not contain any broad, general power to make such findings. However, perhaps the simplest course of action to clarify the situation would be the amendment proposed in my answer to question 19.

116. My answer to question (b) is that the ICAC will be someone of considerable legal experience who would be very unlikely to provoke an unnecessary challenge to the validity of his or her decision by making a finding that a person has actually committed a criminal offence. This is particular true in light of the factors in Schedule 1, which require the ICAC to 'avoid prejudice to current and possible future prosecutions', and to have regard to the impact on 'investigations by law enforcement agencies' and 'current and possible future legal proceedings'.

Question 21

Mr Lander points out that while the ICAC may be able to conduct a public inquiry into allegations of criminal conduct, it cannot make a finding as to whether a person has committed a criminal offence or a breach of discipline. As such, the ICAC is not obliged to provide procedural fairness to that person.

a) How then will the ICAC guard against the potential situation whereby a person could be the subject of public allegations regarding criminal conduct or a breach of discipline but have no right to be heard in relation to those allegations and all that could occur in circumstances where the ICAC is not bound by the rules of evidence?

117. With respect to Mr Lander's comment, I would suggest that the ICAC is actually required to provide procedural fairness to a person in that situation. Under subclause 51(3)(b), the ICAC may make findings as to whether a person has engaged in, is engaging in or is about to engage in, improper conduct. If those findings are adverse, then the common law applies to require the ICAC to provide that person with procedural fairness.
118. However, the question itself appears to relate to other persons whose criminal conduct or breaches of discipline may be discussed or alleged by witnesses in the course of a public inquiry. With respect to this issue, I would draw the committee's attention to clause 43 of the Bill which requires the ICAC to accord procedural fairness to a person in a public inquiry.
119. Recommendation 34 of Commissioner Martin's Report provides that the Bill should provide that '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 presentation of evidence.'
120. The difficulty with implementing this recommendation was to identify what the phrase 'allegations adverse are aired' was intended to mean. Does this mean every time a witness makes derogatory remarks about a person on a matter that has nothing to do with the investigation – say, that the public officer in question is not a good parent – the ICAC is obliged to chase up the person who has been remarked upon and give them the opportunity to defend their parenting abilities? What if that person responded by sniping at the parenting skills and general competence of five more persons? Is the ICAC then obliged to chase all those person and get their views? You can see how it could quickly become absurd, not to mention a huge waste of resources. I therefore took the view that such a literal reading of the Recommendation was untenable, and a line had to be drawn. It seemed a sensible place to draw that line is to require the ICAC to follow up only on matters that could reasonably affect the ICAC's findings on the subject matter of the inquiry.
121. In addition to the requirement to adhere to administrative law principles, and clause 43, the Schedule 1 factors that the ICAC must take into account include 'acting and being seen to act fairly and impartially'.

Question 22

As an investigative body, Professor Aughterson notes the ICAC's investigations are intended to facilitate the actions of other bodies in prosecuting corrupt conduct and its powers carry with them no implication that it should make findings against individuals of corrupt or criminal behaviour.

Related to this, Mr Lander is of the opinion that 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.

a) Is it intended that the ICAC will not make any findings regarding criminal and disciplinary matters but investigate such conduct in order to provide a brief of evidence to the appropriate prosecuting or fact finding body?

b) If so, why does the Bill not clearly distinguish the approach the ICAC should take to conduct involving criminal or disciplinary matters and other types of conduct?

122. I respectfully disagree with the assertion that the ICAC's powers carry no implication that it should make finding against individuals of corrupt behaviour, or the suggestion that the ICAC's investigations are engaged in solely for the limited purpose of criminal prosecution. There is much in the Bill that contradicts this characterisation of the ICAC's role, from the range of reporting tools at its disposal, to the objectives of the Act.
123. Subclause 3(e) of the Bill provides that facilitating prosecutions is only one of the objectives of establishing an ICAC. The ICAC is also intended to investigate the most serious, systemic and sensitive improper conduct (which includes non-criminal conduct that cannot result in prosecution), ensure that other improper conduct is dealt with, and coordinate a response where multiple public bodies have jurisdiction in relation to the improper conduct. Similarly, clause 18 makes it clear that investigating improper conduct is only one of the ICAC's functions. It is also a whistleblower protection body, a body with a broad educative function, and a body that develops and delivers advice, reports, information, and recommendations.
124. An ICAC that only prepares briefs of evidence for prosecution is a potential model for an anti-corruption body, but it is one that would be significantly different from the model proposed by Commissioner Martin and would not align with Recommendations 12, 13, 14, 30, 34, 35, 36, and some aspects of 37 of his report. The preferable model is ultimately a question of policy.
125. As I discussed in my answer to question 11, Commissioner Martin appears to have consciously departed from a model that prescribes different approaches for investigating matters that involve criminal matters versus matters such as misconduct or maladministration. I discuss some relevant implications of adopting the South Australian approach proposed by Mr Lander in my answer to that question.

Question 23

In accordance with subclauses 51(1) and 51(6) where a public inquiry is held, ICAC must make a report within 3 months after its conclusion and it is then tabled in the Legislative Assembly.

a) Is there any reason why the Bill does not include provision for the ICAC to defer the making of a report, where, for example, related criminal proceedings are pending or underway given that this could give rise to potential prejudice to a person?

126. The ICAC is not required to make findings in that report. The ICAC is empowered to include only as much information 'as the ICAC considers appropriate'. In the event that a fulsome report would prejudice related proceedings at that time, it is open to the ICAC to produce a report that notes the status of the matter and that it is not appropriate to include further information in relation to the subject matter of the investigation at this point in time.
127. In this situation, the power at section 51(7) has been provided to allow the ICAC to make the fulsome report at a later date when it would no longer prejudice the related proceeding.

Question 24

Clauses 55 and 56 provide for the ICAC to make recommendations, including in relation to prosecutions and to request a public body or public officer to notify the ICAC of the steps taken or

proposed to be taken to implement the recommendations and, where no steps are taken, the reasons for such.

a) In relation to prosecuting authorities, to what extent does this power interfere with prosecutorial discretion, particularly given the need to explain to the ICAC why a recommendation has not been adopted?

128. It was not contemplated that the ICAC would exercise the recommendations power in this way. However, even if this occurred, the DPP could simply refuse to comply on the basis that its role is to independently exercise prosecutorial discretion. The ICAC cannot legally constrain the DPP's prosecutorial discretion using the power under clause 55, and no ICAC would expect the DPP to comply with such a recommendation. I would expect the DPP to complain to the Inspector on the basis that the ICAC was attempting to exceed its authority, and I do not think the Inspector's response would be flattering to the ICAC. I therefore think it is unlikely that an ICAC would try to do this, but in the event that the ICAC was actually foolish enough to try to give the DPP such a recommendation, it would be of no legal effect.

Question 25

Similarly, Professor Aughterson points out that under subclause 76(1) the ICAC could presumably give notice to the Director of Public Prosecutions requiring that office not to proceed with a prosecution, perhaps pending further inquiry by the ICAC.

a) How does that sit with section 26 of the Director of Public Prosecutions Act, which provides that the Director is not subject to direction by any person in the performance of the Director's functions?

129. Again, it was not contemplated that the ICAC would use the power for this purpose, although theoretically a direction could be given to the DPP under subclause 76(1), and a breach would be a criminal offence. However, the DPP could challenge the notice, which would be invalid if it could not be established that it really was for the purpose of preventing the obstruction of an ICAC investigation or for preventing prejudice to a future prosecution.
130. The DPP could also challenge the notice on the basis that the DPP was authorised by law to not comply to the extent that the notice conflicted with section 26 of the *Director of Public Prosecutions Act*. The good faith provision at section 36 of the *Director of Public Prosecutions Act* would strengthen the DPP's position in that respect. The ICAC would also be at risk of a counter-allegation from the DPP that the ICAC was attempting to pervert the course of justice.
131. As with any situation where two law enforcement organisations have conflicting priorities and the ability to tread on each other's toes, I would expect that the ICAC and the DPP would negotiate a way forward, such as temporarily delaying the prosecution to allow the ICAC to gather evidence which might otherwise be lost, or the ICAC accepting that the prosecution has to take priority.
132. It would be problematic to exclude the DPP from the operation of subclause 76(1) given that the DPP and the DPP's staff are subject to investigation by the ICAC, and this would remove an important tool to prevent the DPP and staff from obstructing such an investigation.

Question 26

The Bill does not express any limitations on 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 matters arising from negligence. With regards to search warrants, Mr Lander raises concerns that clause 67 provides that they may be issued by a justice of the peace rather than a Supreme Court judge as is the case under the ICAC Act (SA).

a) What qualifies a justice of the peace to make a determination as to whether a search warrant should be issued?

133. In the Territory, Justices of the Peace are qualified to issue search warrants to Police for investigations into anything from murder to corruption offences, to minor offences. This raises an awkward question: if we accept that Justices of the Peace are not suitably qualified to issue search warrants for such serious criminal offences to the ICAC, how are they suitably qualified to issue search warrants to Police for those exact same offences, or for that matter for offences that carry life imprisonment? The consequences of the Police investigation are at least as serious, if not potentially more serious, and I expect that a good number of the warrants sought by Police require evaluation of issues of comparable complexity to those that would be required to issue search warrants to the ICAC.
134. You could argue that Police investigations are criminal so Police search warrants will be scrutinised for due process by the courts, whereas some ICAC investigations are not criminal and so do not have this safeguard. However, there is nothing that compels Police to press charges after a search warrant is issued, in which case this judicial scrutiny never occurs. Insofar as other oversight mechanisms are concerned, Police are oversighted by the Ombudsman. The Inspector plays an equivalent role in oversighting the ICAC. So, there are no real grounds to distinguish between the appropriateness of the use of Justices of the Peace on the basis of differing levels of oversight and accountability.
135. During consultation when developing this Bill, the Department was contacted by a senior investigator from an anti-corruption body from another jurisdiction who offered a different concern for allowing Justices of the Peace to issue search warrants. He said that in his experience it would be unwise to seek a search warrant from a Justice of the Peace, because it exposed the warrant to a greater risk of successful challenge when the matter reached prosecution, because Justices of the Peace are generally less thorough at satisfying themselves that a valid basis for the warrant exists. In his view, anti-corruption prosecutions tended to involve defendants who had the means to acquire highly experienced legal counsel, and this resulted in search warrants being challenged more frequently and more successfully than in the majority of regular Police matters.
136. While this is a valid concern, the Territory has a small pool of judicial officers, and that as a result it may be hard to get hold of a judicial officer in relation to a warrant application. It is also relevant that, according to section 6 read with Schedule 1 of the *Justices of the Peace Act*, a Justice of the Peace includes a judicial officer, so clause 67 does not prevent search warrants from being sought from judicial officers. Rather, it offers the ICAC a choice. Hence, if there are certain Justices of the Peace who rigorously assess the grounds for issuing a search warrant, such persons could be alternatives to a judicial officer if a judicial officer was unavailable.
137. I would expect the ICAC to be a person who could appreciate the risks of attempting to get a search warrant from a person who did not properly assess it, and that a prudent ICAC would adopt a policy of obtaining search warrants from judicial officers whenever this was possible.

However, in the interests of providing the flexibility when this is not possible, the option to use a suitable Justice of the Peace could be considered.

Question 27

A search warrant allows a significant infringement to a person's right to privacy and property, yet the Bill provides the only test for whether a warrant be issued is a belief on reasonable grounds that a search warrant is necessary for an investigation.

a) Why does the Bill not require a threshold for the seriousness of the matter under investigation, or an assessment of whether such an infringement of rights is warranted by the seriousness of the investigation?

138. With respect to the general reasons why such coercive powers have been given to the ICAC even with respect to investigations of what some may consider to be less serious conduct, I refer to my answer to question 11.
139. With respect to what is an appropriate threshold test for a search warrant in particular, a 'belief on reasonable grounds' that the search warrant is necessary for the investigation is not an unusual test for the issuing of a search warrant to an anti-corruption body. In fact, I would submit it is an appropriate, middle-of-the-range test.
140. Under section 117 of the *Police Administration Act*, a search warrant is issued when there are 'reasonable grounds for believing' that evidence is at a particular location. Section 87 of the *Crime and Corruption Act 2001* (Qld) makes the test for issuing a warrant 'reasonable grounds for suspecting evidence' is at or will be at the location, which is an even lower threshold because it only requires suspicion. Section 109 of the *Law Enforcement Integrity Commissioner Act* (Cth), the legislation under which Commonwealth law enforcement officer are investigated, similarly uses the test 'reasonable grounds for suspecting' evidence will be on the premises or will be within the next 72 hours. Section 101 of the *Corruption, Crime and Misconduct Commission Act* (WA) has an even lower threshold, requiring only suspicion that the evidence *may* be at the location. Section 40 of the *Independent Commission Against Corruption Act 1988* (NSW) allows the ICAC to self-issue the warrant 'if satisfied there are reasonable grounds for doing so', without any reference to evidence or a location, although it is a condition precedent to this that an investigator applies to the ICAC with 'reasonable grounds for believing' that a document or thing 'may, within the next following 72 hours, be brought into or onto the premises'. Finally, section 91 of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) adopts a test almost identical to that in the Bill, that a search warrant is issued when the authorised officer 'believes on reasonable grounds' that 'entry to the premises' is 'necessary for the purpose of an investigation', and the person issuing the warrant is satisfied that there a 'reasonable grounds for the belief'.
141. None of these statutory tests include a consideration of whether the seriousness of the matter merits the use of a search warrant, and none refer to considering infringement of rights beyond what is necessarily implicit in the test itself. By contrast, Schedule 1 of the Bill actually does provide that the ICAC is to take into account a range of matters when performing its functions, which relevantly include the public interest in 'not interfering with an individual's rights, privileges or privacy, beyond what is reasonably necessary to carry out ICAC's functions effectively'.
142. During development of the Bill, we considered a wording more similar to the *Police Administration Act*, but ultimately adopted a different test in the Bill after feedback from senior

officers at an interstate anti-corruption body who were concerned that our original test would make it very hard to get a valid search warrant in many situations, and that in their experience a test with a lower threshold was required to investigate corruption. This was because relevant evidence in these kinds of matters tends not to be conventional objects like weapons or drugs associated with a particular suspect, but rather electronic evidence that is not necessarily 'at' any particular location, or which can be quickly moved. It is also the nature of these cases that they are often about establishing the nature of a relationship between parties. Where there is information, for example, that suggests a tender and procurement officer had an affair with a contractor, it could be expected that the private premises of one or both parties is likely to reveal evidence as to the nature of the relationship and so progress the investigation. However, the nature and exact location of the evidence could be hard to ascertain prior to executing the search warrant, making it difficult to satisfy the test and preventing proof of the corruption ever being obtained, simply because of the nature of the offending. These are the reasons why anti-corruption bodies have lower threshold tests.

143. After further consideration, the Victorian test was used as a model because:

- it has been updated recently (2016);
- it is drafted with appreciation that much relevant evidence is electronic and not necessarily 'at' the search location, but rather that the information is technically in the cloud, but the means to access that information is by using equipment and information at a particular location; and
- it broadens the test so it is justified by reference to whether entry to the premises is necessary for the purpose of an investigation, which avoids the need to particularise the nature of the evidence, without lowering the threshold to the arguably amorphous notion of 'suspicion'.

Question 28

Under subclause 78(3) where information is provided to the ICAC that would, if it were not for subclause 78(1)(c), attract client legal privilege, 'the ICAC must not make the information to the public.'

a) Can you clarify how that will be achieved where the evidence emerges at an 'open session' as defined in clause 77?

144. I would suggest that, in practice, the evidence will not 'emerge' at an open session.

145. Firstly, it can be noted that the abrogation of client legal privilege under subclause 78(1)(c) only applies when the 'owner' of the privilege is a public body owned by the Territory. Such abrogation is consistent with existing legal frameworks in the Territory for investigating public bodies. Public bodies would undoubtedly obtain and be in a position to obtain legal advice when responding to or participating in an ICAC public inquiry, and would be well able to identify and flag to the ICAC when evidence is likely to stray into discussion of matters of privilege. During development of the Bill, this provision was discussed with the government lawyers who act for the Territory in such matters and it was their view the provision was reasonable.

146. Secondly, as noted in my response to question 15, a public inquiry is a tool used within an investigation. If the question is premised on the assumption that evidence of this nature would emerge as a surprise at a public inquiry before anyone had a chance to consider it, I would suggest this is highly unlikely. The normal process would be that an investigation would

commence, and the public body's documents would be requisitioned and examined well prior to any decision to commence a public inquiry phase. Accordingly, the ICAC would be bound not to make the information available to the public except to the extent necessary to explain or support a finding of improper conduct that the ICAC has made public, as required by subclause 78(3). This would require the evidence to be dealt with in a closed session.

147. The ICAC and the public body's lawyers would be alert to the issues and ready to steer a witness in an open session who might have the capacity to publicly reveal such information away from doing so. Lawyers regularly have to question witnesses in a manner that does not reveal inadmissible evidence known to the witness. If required, I would expect the ICAC to temporarily close the inquiry in order to hear submissions, or to instruct the witness to not give certain answers in public, or to conduct something similar to a *voir dire*.

Question 29

Mr Lander notes that, in the absence of a clear definition, it is not obvious what the phrase 'facing criminal proceedings for an offence' as used in subclause 80(2) actually means?

- a) Can you clarify for the Committee the meaning of this phrase and the intent behind its inclusion in this clause?***

148. I take Mr Lander's point. This definition is probably 'over worded' to the point it raises an ambiguity. It is not intended that 'facing criminal proceedings' mean anything so broad as being a suspect in an investigation. Such a broad definition would severely undermine the ICAC's powers to investigate corrupt conduct. I agree that there is a risk that this argument could be made given that it is offered as a separate reason for refusing to answer questions that is additional to being currently charged with a criminal offence.

149. The Committee may wish to propose an amendment to remove the words 'or facing criminal proceedings for' from subclause 80(2).

Question 30

Clause 30 enables the ICAC to compel a person to incriminate themselves, but subclause 81(1) makes such evidence inadmissible in proceedings against the person. Such a limitation, and corresponding protection of the right against self-incrimination has many precedents.

However, subclause 81(6) allows the ICAC to provide information a person was compelled to give incriminating themselves regarding a major offence to a prosecuting authority.

In considering similar provisions under the NSW Crime Commission Act, the High Court noted that giving the prosecution evidence that the accused could not be compelled to give at the trial, even though it is not admissible at their trial, adversely affects the manner in which the accused 'can conduct their defence and alters their right to a fair trial in a 'fundamental respect'.

- a) What is the justification for this significant abrogation of the right against self-incrimination?***

150. I refer to my answer to question 12, in which I set out the reasons why the provisions dealing with the privilege against self-incrimination have been drafted in this way, noting in particular an intention to comply with Recommendation 17 of Commissioner Martin's report. This recommendation requires that the privilege against self-incrimination be abrogated and

derivative use of the evidence gained as a result to be permitted in a criminal trial against the person.

151. The purpose of subclause 81(6) read with subclause 81(7) is to limit derivative use of evidence in relation to minor offences that are unrelated to the matter under investigation, to permit it in relation to information of overwhelming public interest, or which is needed for the ICAC to carry out its own investigatory functions.
152. Subclause 81(6) must be evaluated in light not only of the limitation in subclause 81(1), but of subclause 80(2), which provides that a person may refuse to answer questions about an offence with which the person has been charged. This is to protect the fundamental principle that a criminal trial be accusatorial. The comments of the High Court referred to in this question come from *Lee v The Queen* (2014) 253 CLR 455, which was a statutory scheme in which there was no equivalent to subclause 80(2).
153. The High Court has shed further light on its reasoning in *Lee v The Queen* in the more recent IBAC case, discussed in my answer to question 12. In the IBAC case, the appellants sought to suggest that that fundamental principle applied to questioning when the accused is a suspect who has not been charged. This was done on the basis of. The High Court held that this argument was 'misconceived' (see para [42] of the IBAC case), because this principle only applies to a person who 'stands accused', that is to say, a person who has been charged with an offence. Subclause 80(2) prohibits the ICAC from compelling answers from a person who has been charged with an offence in relation to that offence. Hence, the NT ICAC's coercive powers to compel evidence do not extend to compelling evidence about a matter that would interfere with the 'forensic balance between prosecution and accused in the judicial process' (see the IBAC case para [48]). At paragraph [51] of that case, the High Court noted that it would be undesirable to accept the appellant's arguments because:

Upon the appellants' construction, the IBAC, while investigating conduct of an examinee, might uncover information that makes a certain person a suspect in relation to a criminal offence, at which point the examination would have to cease, leaving issues which may affect the public interest unexplored.'

154. The inability to address serious public interest issues is the mischief that subclauses 81(6) and 81(7) together seek to avoid. If a witness confesses where they buried a body under coercive questioning, it would be very detrimental to the public interest if this information could not be passed to the Police who are investigating the murder. To enable this to occur, subclause 80(2) provides a framework which protects the fundamental accusatorial nature of a criminal trial.
155. This is particularly significant given that the model in this Bill, as recommended by Commissioner Martin, is one where extensive use is made of referrals to other existing bodies. This is crucial in the Territory context, which is a small jurisdiction that has limited resources to waste in unnecessary double-handling, or with the Police laboriously (and perhaps fruitlessly) trying to solve a murder in the absence of crucial intelligence that is already known to the ICAC. Likewise, if a suspect was to admit under coercive questioning that they had placed a bomb under the Legislative Assembly, I suggest it would be unconscionable if the ICAC could not disclose this information to the relevant bodies to take appropriate action, merely because that information was also evidence of the person committing a criminal offence that was elicited during a compulsory interview.

156. For completeness sake, I also note that the provision preferred by Professor Aughterson, namely section 13(9) of the *New South Wales Crime Commission Act 1985* (NSW) no longer exists, as that legislation was repealed and replaced by the *Crime Commission Act 2012* (NSW).

Question 31

Mr Walker is of the view that it would be preferable if the 'machinery provisions' of Part 2, Division 5 were not available at all in relation to allegations of non-criminal conduct against a Member, and were confined to allegations of criminal conduct against a Member, and allegations against a person or persons not being a Member but involving parliamentary privilege.

a) Do you have any comments you would like to make regarding Mr Walker's proposal?

157. With respect, I would suggest that Mr Walker SC is generally approving of the machinery provisions themselves. He refers to the provisions as a 'nuanced scheme' and endorses their structure particularly at paragraphs [41]-[42]. He then states his conclusion as to the appropriateness of Part 2 Division 5 at paragraph [45] of his Opinion:

It follows that, in my opinion, the proposed provisions of Part 5 Div 2 will not erode the Legislative Assembly's ability to protect material subject to parliamentary privilege, in any real of material way.

158. Hence, my reading of Mr Walker SC's advice on this point is that his concern is not about the suitability of Part 2, Division 5 *per se*, but is referring back to the questions he raises generally about the ICAC investigating some lower level non-criminal conduct in relation to a Member. Those questions are set out at paragraphs [22] to [26] of his Opinion.
159. Mr Walker SC's concern is that the ICAC's adjudication particularly of matters such as 'negligence' and 'incompetence' with respect to Members could lead it into an undesirable public conflict with the Legislative Assembly. He therefore queries whether a similar 'carve-out' such as subclause 12(3) should be enacted with respect to Members of the Legislative Assembly. As set out in my answer to question 5, it is my opinion that clause 82 of the Bill provides the equivalent carve-out for Members of the Legislative Assembly. This carve-out relates to Members engaged in the business of the House in an equivalent way to how clause 12(3) relates to judicial officers engaged in judicial functions. It does not exempt judicial officers in relation to performing duties that are not judicial functions.
160. Ultimately it is a matter of policy whether the ICAC is permitted to investigate Members of the Legislative Assembly for matters that are less than criminal conduct. The policy adopted in the Bill is to permit it, because that was what was recommended by Commissioner Martin. But I would suggest if the Bill does permit such investigations, there is no useful purpose to excluding the operation of the machinery functions in Part 2, Division 5 with respect to such investigations. That would merely leave the procedures to be followed undefined, which would result in unnecessary litigation to determine what those procedures should be in relation to non-criminal conduct. This would be more likely to lead to an embarrassing and protracted public conflict of the kind that Mr Walker SC suggests would be undesirable. It would also be contrary to Commissioner Martin's Recommendation 16, which states: "In particular with respect to parliamentary privilege, the boundaries between the powers of the NT Anti-Corruption Commission and parliamentary privilege be clearly defined."

Question 32

Given an object of the Bill under clause 3(c) of the Bill is to assist the reporting of improper conduct, why doesn't the Bill provide a statutory right for any person to make protected complaints of improper conduct directly to the ICAC or public bodies and public officers as is the case under the Queensland legislation?

161. This question appears to derive from comments made by Mr MacSporran QC. On this point, Mr MacSporran QC refers to sections 36, 216(5), 216A, and 343 of the *Crime and Corruption Act 2001* (Qld).
162. I would submit that the Bill does provide a statutory right to make protected complaints. Clause 98 of the Bill provides that a person who reports improper conduct to the ICAC is protected from civil, criminal, or disciplinary action, as well as from defamation proceedings or any claim of breach of confidentiality. This creates a similar right to that provided by sections 36 and 343 of the Queensland legislation. Further, the Bill provides a comprehensive whistleblower protection scheme with a range of tools to proactively protect whistleblowers that do not have equivalents in the Queensland legislation.
163. Indeed, the right in Queensland is considerably narrower than the right in the ICAC Bill. Section 343 of the Queensland legislation provides the legal immunities in question only with respect to a disclosure of information to the Crime and Corruption Commission for the purpose of performing the Commission's functions. It appears that this limits a whistleblower to reporting 'corruption' as permitted by clause 36. Clause 216A makes it an offence to make a report of corruption to the Commission that is vexatious, reckless, or 'primarily for a mischievous purpose'. The practical result of this narrow definition and exclusions means that a whistleblower cannot report mere suspicious behaviour, but is required to already be certain that the information they possess is strong evidence of serious corruption. Even then, they run the risk that they will be threatened with allegations that the disclosure was made for vexatious or mischievous reasons. It is not even clear what the word 'reckless' might mean in this context. In short, this is a narrow and ambiguous right to make protected complaints that would give a whistleblower little comfort in coming forward. These high thresholds and carve-outs would make it very difficult to create the 'if in doubt, report' culture that is the aim of an effective whistleblower protection scheme as discussed in my answer to question 1.
164. By contrast, clause 98 of the Bill protects disclosures to a wide range of suitable persons as specified by clause 92, and with respect to the broad range of matters defined by clauses 10-15. Further, technical mis-steps by the whistleblower can be cured using clause 93. The only carve-out is for false and misleading disclosures, as discussed in my answer to question 36. The Bill also contains a range of other pro-active tools for protecting whistleblowers throughout Part 6.
165. (For completeness sake, I note that sections 216(5) and 216A referred to by Mr MacSporran QC are limitations on the right created by sections 36 and 343.)

Question 33

Mr Lander notes that declaration of protected communication of the kind provided for in clause 93 would ordinarily be made in a court rather than by an administrative decision maker and that the power given to the ICAC in this clause ought to be reserved for the courts.

a) Is there any particular reason why the ICAC should be empowered in this manner?

166. With respect, I would characterise clause 93 as a procedural safeguard to cure a technical irregularity, and hence an appropriate matter for the ICAC to determine. I note that the nature of clause 93 is not to determine past rights, but to confer protection on a discloser going forward.
167. Clause 93 is a very important tool to offer certainty to all parties as to what action is and is not permitted going forward. Declaring a person to be a protected discloser solely limits taking action against the person for having made a report – that is to say, for example, the person could not be disciplined because making the report would have been a breach of confidentiality but for the operation of clause 93. It does not protect a person generally from action being taken in relation to their own improper conduct. It also does not extend the ICAC’s jurisdiction to investigate, which turns on whether the information before it meets the definitions in clauses 10-15, not on whether a protected communication has been made.
168. Given the limited and prospective nature of clause 93’s operation, and I would submit that there is no need to require the additional safeguard of a court decision, and that this would consume substantial unnecessary resources and greatly limit its utility. Further, the ICAC would often be reluctant to make such applications to a court because of the risks of:
- exposing the whistleblower to greater risk of retaliation by revealing their identity and the full nature of their comments (which, in my experience are often made by whistleblowers who are very upset and include many inflammatory remarks about other persons);
 - unnecessarily broadcasting inflammatory remarks that may unnecessarily damage a person’s reputation before those allegations have been tested or confirmed (and which potentially may not otherwise be published or investigated);
 - exacerbate or create workplace tensions that are likely to lead to negative repercussions for the whistleblower and disruption to the workplace; and
 - prejudicing the investigation by revealing the substance of the allegations in a public forum, or to persons of interest in the investigation.

Question 34

Where a person is charged with the offence of ‘engaging in retaliation in the course of management’, subclause 100(5)(b) provides for a defence that the person believed that the conduct was ‘a reasonable’ way of carrying out their ‘role and responsibilities as a public officer’.

a) Why doesn’t the Bill require that such a belief be reasonable?

169. The Bill sets a higher standard of proof for the criminal offences of retaliation (clauses 99 and 100) compared to civil action for compensation for retaliation (clause 101). The view was taken that criminal liability should not attach to conduct that was a genuine attempt to appropriately carry out the person’s duties as a manager, but rather only to conduct that could be shown to be arbitrary or malicious. In my experience, managing a disgruntled whistleblower is one of the most complex challenges that a manager can encounter. It is a situation where trust has already completely broken down, where staff in the office are taking sides, and where many people are stressed both by the uncertainty of pending allegations and the pressure to produce evidence. It is very easy to make a misstep, and it would be inappropriate to criminalise such

mistakes. For this reason, the criminal offences adopt a subjective test. Subjective tests as to the accused's intentions are the norm for all but minor offences.

170. As for the whistleblower's rights, they are not affected by whether a manager can be successfully prosecuted, as the victim is not a party to a prosecution. Rather, the whistleblower's rights are to compensation for retaliation. For the purpose of obtaining compensation under clause 101, the focal question is whether the retaliation occurred for a prohibited reason as defined by clause 94. The reasonableness of everyone's behaviour is an explicit consideration at clause 101(4). This provides all parties with an incentive to behave as reasonably as possible.

Question 35

Given the key function of the Inspector is to oversight the ICAC, is there any particular reason why the position is not being empowered to report on an on-going or 'as needs' basis rather than being restricted to providing an annual evaluation of the ICAC?

171. The intention is not to establish a secondary ICAC to investigate the ICAC, which would be a resource-intensive exercise with limited benefit. I note that the Inspector is able to respond to complaints on an as-needs basis, however I take the point that the Inspector is not explicitly empowered to make reports on issues that arise on an as-needs basis.
172. I would not see any significant difficulty with the Committee recommending an amendment that empowered the Inspector to make such reports to the Minister or the Legislative Assembly (at the Inspector's discretion), although it does carry a minor increased risk of 'function creep', with corresponding resourcing implications. It might therefore be prudent to specify that the this power is applicable when the Inspector forms the view that the annual evaluation would be an insufficient tool to communicate concerns.

Question 36

While it is acknowledged that the Bill provides comprehensive whistleblower protections, it has been suggested that it does not go far enough when it comes to dealing with persons who make false allegations or make allegations as an abuse of process.

- a) What provision does the Bill make for protecting persons against frivolous, vexatious or unfounded allegations?***

173. Leading whistleblower research emphasises repeatedly that an effective whistleblower scheme does not limit reports based on the whistleblower's motivations, but prohibits only false and misleading information.⁶ This is because accurate disclosures of corruption very frequently come from disgruntled persons, because people who are not disgruntled are reluctant to 'dob in their mates', so to speak. A best practice whistleblower protection scheme protects encourages all disclosures made in good faith, but excludes protection for information that a person knows is false or misleading (including misleading by omission).
174. Accordingly, clause 91 provides that providing misleading information to the ICAC is not protected. Misleading information is defined in clause 4 to mean information that is 'misleading in a material particular or because of the omission of a material particular'. Further, the provision of misleading information to the ICAC or anyone performing an official role to accept

⁶ <http://www.whistlingwhiletheywork.edu.au>

the protected communication is an offence (clause 151). The ICAC has the power to investigate an offence against clause 151 and provide a brief of evidence for prosecution.

175. The mischief of frivolous, vexatious, or unfounded allegations are dealt with via the ICAC's broad discretion to simply refuse to progress matters that it believes lack merit. The ICAC is not a 'complaints' body as such, and is under no obligation to spend its resources attempting to satisfy a complainant. If allegations were frivolous, vexatious, or unfounded, this would be good reason not to refer them and not to investigate them either.