



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Social Policy Scrutiny Committee

**Inquiry into the Independent
Commissioner Against
Corruption Bill 2017**

November 2017

Contents

| | |
|--|-----------|
| Chair’s Preface | 5 |
| Committee Members | 6 |
| Committee Secretariat | 7 |
| Acknowledgments..... | 7 |
| Terms of Reference | 8 |
| Recommendations | 10 |
| | |
| 1 Introduction | 13 |
| Introduction of the Bill | 13 |
| Conduct of the Inquiry | 13 |
| Outcome of Committee’s Consideration | 13 |
| Report Structure | 14 |
| | |
| 2 Provisions of the Bill..... | 15 |
| Background to the Bill | 15 |
| Purpose and Overview of the Bill | 16 |
| | |
| 3 Examination of the Bill..... | 19 |
| Introduction..... | 19 |
| Remit of the ICAC | 19 |
| Definition of Improper Conduct | 19 |
| Committee’s Comments..... | 21 |
| Education | 22 |
| Committee’s Comments..... | 23 |
| Investigation and Information Gathering Powers | 23 |
| Committee’s Comments..... | 24 |
| Definition of Public Body | 24 |
| Committee’s Comments..... | 25 |
| Functions of the ICAC – Referral Powers | 25 |
| Committee’s Comments..... | 27 |
| Mandatory Reporting of Suspected Improper Conduct..... | 28 |
| Committee’s Comments..... | 28 |
| Public Inquiries | 29 |
| Committee’s Comments..... | 31 |
| Reports | 32 |
| Committee’s Comments..... | 33 |
| Search Warrants..... | 33 |
| Committee’s Comments..... | 35 |
| Client Legal Privilege..... | 36 |
| Committee’s Comments..... | 37 |
| Privilege Against Self-Incrimination..... | 37 |
| Compelling Evidence..... | 39 |
| Committee’s Comments..... | 40 |
| Removal of Ambiguity – Clause 80(2)..... | 40 |
| Committee’s Comments..... | 41 |
| Subsequent Use of Representations Made by Witness..... | 41 |

| | |
|---|-----------|
| Committee's Comments | 43 |
| Parliamentary Privilege and the Separation of Powers | 44 |
| Committee's Comments | 47 |
| Protected Communications | 48 |
| Committee's Comments | 49 |
| Offence to Engage in Retaliation in Course of Management | 50 |
| Committee's Comments | 50 |
| Misleading Information | 50 |
| Committee's Comments | 51 |
| Appointment of the ICAC | 52 |
| Committee's Comments | 53 |
| Appointment of Inspector and Oversight of the ICAC | 53 |
| Committee's Comments | 55 |
| Repeal and Transitional Matters | 55 |
| Committee's Comments | 56 |
| Typographical Errors | 56 |
| Committee's Comments | 56 |
| 4 Schedule of Proposed Amendments | 57 |
| Appendix A: Submissions Received and Public Hearings | 62 |
| Bibliography | 63 |

Chair's Preface

This report details the Committee's findings regarding its examination of the Independent Commissioner Against Corruption Bill 2017. The Bill aligns with and largely implements all but two of Commissioner Martin's recommendations as detailed in his May 2016 *Anti-Corruption, Integrity and Misconduct Commission Inquiry*¹ report to the Administrator. The Bill also repeals the *Public Interest Disclosure Act* and encompasses the functions that to date have been undertaken by the Office of the Commissioner of Public Interest Disclosures. As such, the Bill provides for an anti-corruption watchdog that is tailored to the unique circumstances of the Northern Territory.

The Committee has recommended that the Assembly pass this significant piece of legislation with the proposed amendments as set out in the schedule in Chapter 4. The majority of these amendments go to ensuring that the Bill is unambiguous and drafted in a sufficiently clear and precise manner. The submissions to the inquiry also raised some important policy questions. Most of these were resolved for the Committee by the Bill following the policies recommended in the Martin report.

However, there were a couple of points where the Bill went beyond the recommendations of Commissioner Martin, most notably in relation to the rights and liberties of individuals and the role of parliamentary privilege, and as a consequence the Committee recommended some changes to more closely align the Bill with Commissioner Martin's recommendations.

The Committee notes that its review process was greatly enhanced by the advice and suggestions of a number of eminent practitioners in the field including: the Hon Bruce Lander QC (Independent Commissioner Against Corruption SA), Mr Alan MacSporran QC (Chair: Crime and Corruption Commission QLD), Mr Richard Bingham (CEO: Integrity Commission TAS) and Mr Bret Walker SC.

On behalf of the Committee, I would like to thank all those who made submissions or appeared before the Committee. Their input has been invaluable and highlights the benefits of opening up the Parliament to the people and increasing participation in the legislative process. The Committee also thanks Professor Aughterson and the Department of the Attorney-General and Justice for their advice.

I would also like to thank the members of the Committee for their bipartisan commitment to the legislative review process.








Ms Ngaree Ah Kit MLA

Chair

¹ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016

Committee Members

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

Committee Secretariat

Committee Secretary: Julia Knight

Administration/Research Officer: Annie McCall

Administration Assistant: Kim Cowcher

Contact Details: GPO Box 3721 DARWIN NT 0801

Tel: +61 08 8946 1485

Email: SPSC@nt.gov.au

Acknowledgments

The Committee acknowledges the individuals and organisations that provided written submissions or oral evidence at public hearings.

Terms of Reference

Sessional Order 13

Establishment of Scrutiny Committees

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

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

Adopted 24 August 2017

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Independent Commissioner Against Corruption Bill 2017 with the proposed amendments as set out in the schedule in Chapter 4.

Recommendation 2

The Committee recommends that to avoid any ambiguity, clause 12(1)(a)(i) be amended by removing the words 'illegality or'.

Recommendation 3

The Committee recommends that to avoid any ambiguity, the words 'another entity' in clauses 18(1)(c)(iv), 18(3)(b), 18(4) and clause 4(g) of Schedule 1 be removed and replaced with the words 'referral entity'.

Recommendation 4

The Committee recommends that:

- (a) clause 22 be amended to include a corporations law displacement provision for the purposes of the *Corporations Act 2001* (Cth), section 5G, in relation to section 1317AE of that Act to accommodate corporations that fall within the Bill's definition of a 'public body', noting that commencement of the provision is subject to agreement by the Commonwealth, States and the ACT; and
- (b) the Government commence processes to enable a comprehensive corporations law displacement provision to be enacted.

Recommendation 5

The Committee recommends that the Bill be amended to give witnesses a right to apply for a direction for a private hearing or non-publication under clause 46; and require that the ICAC advise witnesses in the notice requiring attendance and in an open session before giving evidence of:

- (a) their right to make application, before or during an open session, for a direction under clause 46 regarding directions for private hearing and non-publication; and
- (b) their rights under clauses 80(3) and 80(4) regarding privilege against self-incrimination.

Recommendation 6

The Committee recommends that to minimise the risk of unnecessary legal challenges, clause 49 be amended to include:

- (a) a clause equivalent to 51(3) to include an express power to make comment or findings in an investigation report; and
- (b) the corresponding limitations of an equivalent clause 51(4) regarding making findings on offences and breaches of discipline.

Recommendation 7

The Committee recommends that:

1. clauses 67 and 68 be amended by removing the words 'Justice of the Peace' and replacing them with the words 'Judicial Officer'.
2. the Department of the Attorney-General and Justice undertake a review of processes for the issuing of search warrants in the Northern Territory.

Recommendation 8

The Committee recommends that to avoid any potential of a legal challenge, clause 80(2) be amended by removing the words 'or facing criminal proceedings for'.

Recommendation 9

The Committee alerts the Assembly to the significant abrogation of the privilege against self-incrimination by allowing the ICAC to pass compelled self-incriminating evidence on to a prosecuting authority as provided for in clause 81(6) and recommends that the Assembly consider whether this abrogation of the fundamental right against self-incrimination is justified.

Recommendation 10

The Committee recommends that clause 12(3) be amended to read as follows:

Despite subsection (1), unsatisfactory conduct does not include any conduct engaged in by a judicial officer in the performance of judicial functions, or by a Member of the Legislative Assembly.

Recommendation 11

The Committee recommends that clause 112(2) be amended such that the appointment of the ICAC by the Administrator can be made only after:

- (a) an advisory panel chaired by a former Supreme Court Judge and including the Solicitor-General for the Northern Territory and the Chief Executive Officer of the Department of the Attorney-General and Justice makes a recommendation to the Assembly Committee, or if there is no Assembly Committee the Legislative Assembly; and
- (b) the Assembly Committee, or if there is no Assembly Committee the Legislative Assembly, makes a recommendation to the Administrator.

Recommendation 12

The Committee recommends that Clause 136 be amended to:

- (a) empower the Inspector to make general reports to the Minister or the designated oversight Committee when the Inspector is of the view that the annual evaluation would be an insufficient tool to communicate concerns; and
- (b) require the ICAC Minister to table a copy of any such reports in the Legislative Assembly within 6 sitting days of receipt.

Recommendation 13

The Committee recommends that clause 160 be amended to include a provision for the transfer of all records from the Office of the Commissioner for Public Interest Disclosures to the ICAC.

Recommendation 14

The Committee recommends that the reference to section 0 in clause 129(1)(f) be amended to section 105 and that the numbering of subsequent clauses be corrected to remove duplication of a clause (1)(f).

1 Introduction

Introduction of the Bill

1.1 The Independent Commissioner Against Corruption Bill 2017 (the Bill) was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA, on 23 August 2017.² The Assembly subsequently referred the Bill to the Social Policy Scrutiny Committee on 24 August for inquiry and report by 21 November 2017.³

Conduct of the Inquiry

1.2 At its meeting on 29 August 2017, the Committee called for submissions by 29 September 2017. The call for submissions was advertised in the NT News, Katherine Regional Times, Tennant Creek District Times, Centralian Advocate, and via the Legislative Assembly website, Facebook, Twitter feed and email subscription service. A copy of the advertisement was also forwarded to all Members for circulation. In addition, the Committee directly contacted a number of individuals and organisations.

1.3 The Bill and associated Explanatory Statement was forwarded to Professor Ned Aughterson for review of fundamental legislative principles under Sessional Order 13(4)(c). The Committee also wrote to the Attorney-General and Minister for Justice seeking briefing materials from the Government including submissions received in response to consultations on the exposure draft.

1.4 As noted in Appendix A, the Committee received 12 submissions, all of which provided constructive feedback on the Bill. The Committee held public hearings with 11 witnesses in Darwin on 9 October 2017.

Outcome of Committee's Consideration

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

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

² Parliamentary Record, (Hansard) and Minutes of Proceedings, 13th Assembly, Debates, 23/08/2017, p.1, https://parliament.nt.gov.au/_data/assets/pdf_file/0019/443341/FINAL-DEBATES-DAY-5-23-AUGUST-2017.pdf

³ Parliamentary Record, (Hansard) and Minutes of Proceedings, 13th Assembly, Debates, 24/08/2017, p.70, https://parliament.nt.gov.au/_data/assets/pdf_file/0003/443568/DEBATES-DAY-6-24-AUGUST-2017.pdf

1.6 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with the proposed amendments as set out in the schedule in Chapter 4. In accordance with clauses 4(c)(iii) and 4(c)(iv) of the Committee's terms of reference, the Committee has proposed a number of amendments and recommendations which seek to ensure that the Bill:

- confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer;
- provides appropriate protection against self-incrimination; and
- is unambiguous and drafted in a sufficiently clear and precise way.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Independent Commissioner Against Corruption Bill 2017 with the proposed amendments as set out in the schedule in Chapter 4.

Report Structure

- 1.7 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.8 Chapter 3 considers the main issues raised in evidence received.
- 1.9 Chapter 4 provides the Schedule of Proposed Amendments to the Bill recommended by the Committee.

2 Provisions of the Bill

Background to the Bill

- 2.1 On 26 August 2015 the Legislative Assembly resolved to establish an anti-corruption, integrity and misconduct commission and, pursuant to section 4A of the *Inquiries Act*, to appoint a person qualified to be a judge in the Supreme Court of the Northern Territory to inquire into and report to the Administrator concerning the establishment of an anti-corruption watchdog for the Northern Territory.⁴
- 2.2 Acting with the advice of the Executive Council, on 14 December 2015 the Administrator appointed the Hon Brian Martin AO QC as Commissioner, NT Anti-Corruption, Integrity and Misconduct Commission to conduct an inquiry into:
1. The establishment of an independent anti-corruption body in the Northern Territory, including but not limited to the following considerations:
 - (a) the principles and provisions of Independent Commission Against Corruption (ICAC) and like legislation in other Australian jurisdictions and their applicability to the Northern Territory; and
 - (b) the appropriate powers such a body should have, including but not limited to:
 - (i) the power to investigate allegations of corruption, including against Ministers, Members of the Legislative Assembly and other public officials; and
 - (ii) the power to conduct investigations and inquiries into corrupt activities and system-wide anti-corruption reforms as it sees fit; and
 - (iii) the appropriate trigger for an NT ICAC's jurisdiction and the relationship between this body and other NT bodies such as the Ombudsman; and
 - (iv) models from any other jurisdictions; and
 - (v) the use of existing NT legislation or NT statutory authorities.
 2. The report is to include indicative costs of establishing the various models put forward.
 3. The Commissioner is to consult with relevant stakeholders including but not limited to the Police Force of the Northern Territory, the Law Society Northern Territory and the Criminal Lawyers Association of the Northern Territory.
 4. The Commissioner is to provide advice and report back to the Administrator in a timely manner.⁵

⁴ Parliamentary Record, (Hansard) and Minutes of Proceedings, 12th Assembly, Full Text Transcripts, 26/08/2015, Parliamentary Record No. 22, https://parliament.nt.gov.au/business/hansard/transcripts/listing/nest_content?target_id=346509&parent_id=358614

⁵ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p. 242

- 2.3 The Commissioner provided his report (the Martin Report) to the Administrator on 27 May 2016. In accordance with the *Inquiries Act*⁶, the report was tabled in the Legislative Assembly by the then Chief Minister, the Hon Adam Giles MLA, on 27 June 2016.⁷
- 2.4 Following consideration of the Martin Report, on 28 June 2017 the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA released an exposure draft Bill to create an Independent Commissioner Against Corruption for public comment, with submissions due by close of business 26 July 2017. During the first two weeks of July the Department of the Attorney-General and Justice also held a series of public information sessions in the main regional centres across the Territory.⁸
- 2.5 According to the *ICAC Bill Compared to the Recommendations of the Martin Report* document, the model adopted in the exposure draft aligns with and implements in principle 50 of the 52 recommendations made by the Commissioner.⁹ Recommendations 4 and 5 were not followed as they involved:
- directly appointing the South Australian ICAC the Hon Bruce Lander QC as the first NT ICAC on a part-time basis for the first two years. The Government would prefer a full-time Commissioner based in the Territory chosen by an independent panel in a similar process to that used for Supreme Court judges.¹⁰

Purpose and Overview of the Bill

- 2.6 The ICAC Bill creates a new anti-corruption watchdog for the Northern Territory. While the ICAC has a wide remit, it is tasked with focusing on the most serious, sensitive, systemic and anti-democratic conduct, with less serious matters to be referred to other existing bodies, unless there is a good reason not to do so.¹¹
- 2.7 Although the ICAC's powers and procedures are directed primarily towards investigation, this is not an end in and of itself. Rather, the ultimate goals of the ICAC in carrying out its functions are to:
- prevent or minimise the occurrence of improper conduct;

⁶ *Inquiries Act 2016* (NT), s4A(4)

⁷ Parliamentary Record, (Hansard) and Minutes of Proceedings, 12th Assembly, Full Text Transcripts, 27/06/2016, Parliamentary Record No. 30, https://parliament.nt.gov.au/business/hansard/transcripts/listing/nest_content?target_id=362094&parent_id=358614

⁸ Hon N Fyles, *Restoring Trust in Government – An NT ICAC*, Media Release, Northern Territory Government Newsroom, Darwin NT, 28 June 2017, <http://newsroom.nt.gov.au/mediaRelease/23349>

⁹ Department of the Attorney-General and Justice, *ICAC Bill compared to the Recommendations of the Martin Report*, Northern Territory Government, Darwin NT, June 2017, <https://justice.nt.gov.au/attorney-general-and-justice/law/icac-bill>

¹⁰ Department of the Attorney-General and Justice, *Independent Commissioner Against Corruption – Frequently Asked Questions*, Northern Territory Government, Darwin NT, June 2017, p.3, <https://justice.nt.gov.au/attorney-general-and-justice/law/icac-bill>

¹¹ Explanatory Statement, *Independent Commissioner Against Corruption Bill (Serial No. 30)*, 23 August 2017, https://parliament.nt.gov.au/_data/assets/pdf_file/0008/443087/379-Explanatory-Statement,-Independent-Commissioner-Against-Corruption-Bill-2017.pdf

- improve public confidence that improper conduct will be detected and dealt with appropriately;
- encourage the reporting of improper conduct and encourage people to assist the ICAC;
- protect persons who report improper conduct (whistleblower protection); and
- augment the Territory's existing framework for responding to improper conduct.¹²

2.8 Key features of the Bill include:

- appointment of an Independent Commissioner Against Corruption by the Administrator. An Acting ICAC can also be appointed to act as the ICAC in the ICAC's absence or to act concurrently with the ICAC in relation to particular matters where, for example, the ICAC has a conflict of interest.
- the power to investigate a wide range of 'improper conduct', which incorporates 'corrupt conduct', 'misconduct', 'unsatisfactory conduct', and 'anti-democratic conduct', in the broader public sector. The latter not only includes Government Agencies and statutory authorities, but local government entities, contract service providers, and recipients of Northern Territory Government funding.
- the power to create a mandatory reporting scheme, and to impose varying requirements for mandatory reporting which may include, for example, higher reporting requirements for persons at senior classifications, or in certain agencies.
- the flexibility to deal with improper conduct using a range of methods, including audits, investigations, joint investigations, referrals (with or without control of the referral), making recommendations for change, and providing briefs of evidence for prosecution or disciplinary action. Unless it is deemed to be in the public interest, the Bill contains a presumption that investigations will be carried out in private.
- the ability for the ICAC to investigate wrongful conduct committed prior to commencement of the Act, with no time limit as to how far back the ICAC can go.
- the provision of comprehensive investigation powers, including powers to enter public sector premises without a warrant, and private premises with a warrant and to compel witnesses to attend and give evidence on oath.
- appointment of an ICAC Inspector, a statutory role tasked with overseeing the ICAC and ensuring that it acts within its powers. The Inspector can also receive and investigate complaints about the ICAC and its staff.¹³

¹² Explanatory Statement, *Independent Commissioner Against Corruption Bill (Serial No. 30)*, 23 August 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.4

¹³ Explanatory Statement, *Independent Commissioner Against Corruption Bill (Serial No. 30)*, 23 August 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>

- 2.9 In addition to the above, the ICAC Bill repeals the *Public Interest Disclosure Act*, providing for any outstanding investigations and disclosures to be transferred to the ICAC. The Bill not only continues the whistleblower protections scheme from the *Public Interest Disclosure Act*, but strengthens the scheme and clarifies lines of responsibility.¹⁴
- 2.10 It is further noted that the Bill is not intended to contain all the ICAC's powers, as some key powers are provided for in the ICAC (Consequential and Related Amendments) Bill (Serial 35). For example, this latter Bill facilitates the ICAC's access to Correctional premises and to prisoners as required and provides the ICAC with the power to apply for warrants to conduct controlled operations; use and install surveillance devices and intercept telecommunications.¹⁵ The provisions of the ICAC (Consequential and Related Amendments) Bill are the subject of a separate inquiry by the Committee.¹⁶

¹⁴ Explanatory Statement, *Independent Commissioner Against Corruption Bill (Serial No. 30)*, 23 August 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>

¹⁵ Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill (Serial 35)*, <https://parliament.nt.gov.au/committees/spsc/CRA>

¹⁶ See: *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill Inquiry*, <https://parliament.nt.gov.au/committees/spsc/CRA>

3 Examination of the Bill

Introduction

3.1 The submissions received were very supportive of the Bill. Indeed, witnesses commended the Government for bringing forward the legislation. Many of the submissions sought clarification on the anticipated operation of the Bill, while others provided suggestions as to how the Bill might be improved. The following discussion considers the issues raised in the evidence received along with the advice provided by Professor Ned Aughterson regarding compliance with Sessional Order 13(4)(c), and the responses to the Committee's written questions provided by the Department of the Attorney-General and Justice (the Department).

Remit of the ICAC

3.2 In considering the remit of the ICAC, the Committee acknowledges that the Bill aligns with and largely implements all but two of Commissioner Martin's recommendations as detailed in his May 2016 report to the Administrator. Similarly, in repealing the *Public Interest Disclosure Act*, the Bill encompasses the functions that to date have been undertaken by the Office of the Commissioner for Public Interest Disclosures. As the Hon Bruce Lander QC (Independent Commissioner Against Corruption SA) pointed out, in doing so the Bill shapes the Northern Territory's "integrity architecture to fit its own unique political and historical environment."¹⁷

Definition of Improper Conduct

3.3 Clause 9 of the Bill structures the jurisdiction of the ICAC around investigation of five distinct kinds of 'improper conduct': corrupt conduct, misconduct, unsatisfactory conduct, anti-democratic conduct and conduct constituting an offence against the Act as defined in clauses 10 – 15. A number of witnesses raised concerns regarding the nature and breadth of the definition of 'improper conduct'. As the Hon Bruce Lander QC pointed out:

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

The Committee might consider whether the complex and wide-ranging definition of 'improper conduct' in the Bill may have the unintentional consequence of delaying or hindering reports by public officers.¹⁸

3.4 While noting that this issue was raised and considered during development of the Bill, the Department advised that:

¹⁷ Independent Commissioner Against Corruption SA, Submission No. 8, p.1

¹⁸ Independent Commissioner Against Corruption SA, Submission No. 8, p.2; see also Hon Bruce Lander QC, Committee Transcript, 9 October 2017, pp.10-11

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 or referred to avenues to report improper conduct.¹⁹

- 3.5 Recommendation 12 of the Martin Report provides the basis for the definitions of conduct that fall within ‘improper conduct’.²⁰ In implementing this recommendation, the Department pointed out that:

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. ... 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.²¹

- 3.6 Professor Aughterson noted that the range of matters that can be categorised as ‘corrupt conduct’ and investigated by the ICAC could give rise to uncertainty and injustice:

As indicated by the NSW Court of Appeal in *Greiner v ICAC* (1992) 28 NSWLR 125, 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.²²

However, as Mr Alan MacSporran QC (Chair: Crime and Corruption Commission QLD) pointed out, definitions of corrupt conduct in anti-corruption legislation invariably tend to be ‘unique to the Act’ and significantly broader than that defined in the criminal code, incorporating serious misconduct such as disciplinary breaches that warrant dismissal which would not normally be taken up by the criminal code.²³

The definition is always a vexed area because definitions in this area almost always tend to be rather obtuse for the simple reason that they seek to canvass and cover a lot of potentially corrupt conduct.²⁴

- 3.7 While acknowledging Professor Aughterson’s point that the term ‘corrupt conduct’ has a ‘sting’ that would not necessarily be associated with a disciplinary breach warranting dismissal, the Department pointed out that narrowing the definition of ‘corrupt conduct’ 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

¹⁹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.3

²⁰ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, pp.11, 96-7, 106

²¹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, pp.3-4

²² Professor Aughterson, *Review of the ICAC Bill*, (unpublished) 2 October 2017, pp.2-3

²³ Mr Alan MacSporran QC, *Committee Transcript*, 9 October 2017, p.9

²⁴ Mr Alan MacSporran QC, *Committee Transcript*, 9 October 2017, p.5

issues such as prosecutions that cannot proceed or convictions quashed on appeal.²⁵

- 3.8 With regards to clause 12, ‘meaning of unsatisfactory conduct’, Mr Alan MacSporran QC was of the view that its inclusion in the definition of improper conduct may prove somewhat onerous for the ICAC.

I think it is worthwhile to not have the anti-corruption agency dealing with things that should be properly dealt with by the agency themselves. I mean agencies across the public sector routinely do manage their codes of conduct which are designed to ensure that public sector employees and public officials, more generally, do behave appropriately. There are lots of aspects of breaches of the code of conduct which are matters properly to be addressed by the human resource department I suppose within the agency, rather than coming to the anti-corruption agency, such as ourselves and the proposed Northern Territory model.²⁶

- 3.9 In relation to the Queensland legislation, Mr MacSporran further noted that following a review of the *Crime and Corruption Act 2001* (QLD), in 2014 the Commission’s jurisdiction was amended and:

confined to the more serious and systemic issues ... initially we were getting, in the view of those that reviewed our Act in 2013 ... we were getting far too many complaints. Many of which were so minor and many which had no substance at all that we were getting bogged down in things that we should not have been involved in in the first place.²⁷

- 3.10 However, as noted previously, the inclusion of unsatisfactory conduct in the definition of ‘improper conduct’ is largely due to the fact that the ICAC’s jurisdiction incorporates the functions currently undertaken by the Commissioner for Public Interest Disclosures. As such, Commissioner Martin recommended that the “Territory adopt the South Australian definition of maladministration.”²⁸

- 3.11 Nevertheless, the Hon Bruce Lander QC noted that whereas the South Australian definition includes “conduct resulting from impropriety, incompetence or negligence”²⁹, clause 12(1) of the Bill includes conduct that involves ‘illegality or impropriety; or negligence; or incompetence’. As Mr Lander pointed out:

I am not sure what is meant by that, whether that means criminal conduct or unlawful conduct or some other type of conduct, because illegal conduct and illegality is not defined. So I think therefore there are some tensions between the various clauses and they are tensions that I think probably need to be addressed.³⁰

Committee’s Comments

- 3.12 The Committee acknowledges the comments made by witnesses and notes that, as has occurred elsewhere, subsequent reviews of the ICAC may well determine

²⁵ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.7

²⁶ Mr Alan MacSporran QC, Committee Transcript, 9 October 2017, p.7

²⁷ Mr Alan MacSporran QC, Committee Transcript, 9 October 2017, p.8

²⁸ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, pp.107

²⁹ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, pp.106

³⁰ Hon Bruce Lander QC, Committee Transcript, 9 October 2017, p.11

that there is need to revise aspects of the legislation. However, subject to the proposed amendments and recommendations detailed below, the Committee is of the view that the Bill articulates the recommendations of the Martin Report and the model for an NT anti-corruption model as proposed by Commissioner Martin.

- 3.13 However, the Committee acknowledges the Hon Bruce Lander QC's comment regarding inclusion of the word 'illegality' in clause 12(1)(a)(i) relating to the 'meaning of unsatisfactory conduct'. In the absence of a definition of 'illegality' in the Bill, the Committee is of the view that to avoid any ambiguity the word should be removed.

Recommendation 2

The Committee recommends that to avoid any ambiguity, clause 12(1)(a)(i) be amended by removing the words 'illegality or'.

Education

- 3.14 Given the preceding discussion, practitioners in the field highlighted the importance of the ICAC's educative function. As the Hon Bruce Lander QC pointed out, despite having a fairly aggressive education program in South Australia, it still has not proved as effective as he would have wished.³¹
- 3.15 Mr Richard Bingham (Chief Executive Officer: Integrity Commission Tasmania) noted that the Commission conducts a range of stakeholder engagement strategies and has developed a number of e-learning resources and videos that consider various scenarios which are very well used by the public sector.³²
- 3.16 While the Bill provides that the manner in which the ICAC will communicate its remit to the general public is a matter for the ICAC to determine, the Committee notes that clause 129 of the Bill requires the ICAC to establish and maintain an appropriate website which is to include information regarding:
- the ICAC's functions
 - explanations of how to make an allegation of improper conduct to the ICAC and how to make a complaint about the ICAC to the Inspector
 - directions and guidelines regarding mandatory reporting; minimising retaliation; and guidelines and practice directions regarding the manner in which functions under the Act are to be performed by ICAC staff.
- 3.17 While not specifically provided for in the Bill, the Department noted that:
- 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 clarifications as to whether a complaint can be made. I would expect the NT

³¹ Hon Bruce Lander QC, Committee Transcript, 9 October 2017, p.14

³² Mr Richard Bingham, Committee Transcript, 9 October 2017, p.18

ICAC to adopt these usual practices, which will form the chief source of information for persons in deciding whether to report.³³

Committee's Comments

- 3.18 The Committee notes the advice from practitioners in the field and agrees that the success of the NT ICAC will, in part, be determined by its capacity to engage effectively with both the public sector and the community at large. In this regard it is expected that the ICAC will draw on and learn from the experiences in other jurisdictions.

Investigation and Information Gathering Powers

- 3.19 Concern was raised that the Bill's compulsive and intrusive powers are not scaled to the gravity of the matter being investigated. As the Hon Bruce Lander QC noted:

what concerns me about the bill from an outsiders point of view is that you have got all these strong powers that the ICAC has in relation to an investigation and those strong powers can be used for trivial little matters because of the way in which the bill is constructed. It would mean for example that you could use the coercive powers that overrule the common law for matters that do not amount to criminal conduct. I do not think that those are usually provisions that are given to investigative bodies such as the ICAC. Usually those coercive powers are given in circumstances where you are investigating criminal conduct or very serious misconduct.³⁴

- 3.20 In recommending the powers that should be available to the ICAC, including coercive and intrusive powers, the Department noted that Commissioner Martin did not suggest that there should be any scaling of powers depending on the gravity of the matter being investigated.³⁵ Moreover, as the Department pointed out:

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 any kind of offence – there is no requirement that the investigation be into a serious crime ... While Commissioner Martin proposes a tiered system, he does this with respect to prioritising matters, not with respect to the ICAC's powers.³⁶

- 3.21 It is further noted that in this regard the Bill is not dissimilar to the New South Wales and Victorian anti-corruption legislation, both of which provide for the exercise of coercive powers in relation to a broad range of non-criminal corrupt

³³ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.2

³⁴ Hon Bruce Lander QC, Committee Transcript, 9 October 2017, p.12

³⁵ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.16

³⁶ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, pp.16-17

conduct.³⁷ The Committee also notes that Schedule 1 of the Bill requires that in performing its functions the ICAC take into consideration a range of matters including ensuring that it:

- acts and is seen to act fairly and impartially;
- does not interfere with an individual's rights, privileges or privacy beyond what is reasonably necessary to carry out the ICAC's functions effectively;
- upholds the proper functioning of democratic processes.

Committee's Comments

3.22 The Committee is satisfied with the Department's clarification regarding the way in which the Bill has been framed in respect of providing the ICAC discretion as to the use of coercive and intrusive powers.

Definition of Public Body

3.23 Clause 16(1) defines what entities are considered to be public bodies. Clause 16(1)(f) includes a body established under an Act, and clause 16(1)(l) refers to any other body supported by government funds or performing a public function on behalf of the Territory. Given these definitions, Mr Bret Walker SC noted that there exists a potential for clause 16(1) to encompass the Legislative Assembly as a 'public body'.³⁸

3.24 While noting that he doubts this is intended, Mr Walker points out that if he were wrong:

it would be an extraordinary abdication of appropriate self-governance for legislation to be enacted giving the supervision of fundamental standards of and in the Legislative Assembly to the proposed ICAC. For more abundant caution, I advise that the Legislative Assembly be expressly excluded from the definition proposed by cl [16] of 'public body'.³⁹

3.25 Given that the Legislative Assembly is a body established by the *Northern Territory (Self-Government) Act 1978* (Cth), and section 17 of the *Interpretation Act* specifically provides that an 'Act' means an Act of the Northern Territory rather than a Commonwealth Act, the Department advised that the "Legislative Assembly therefore cannot be a 'public body' by virtue of clause 16(1)(f)." ⁴⁰

3.26 Similarly, the Department pointed out that the Legislative Assembly would not be considered an entity that directly or indirectly receives public resources since it

³⁷ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p. 17

³⁸ Mr Bret Walker SC (on behalf of the Hon Kezia Purick MLA, Speaker, Legislative Assembly of the Northern Territory), Submission No. 3, p.9

³⁹ Mr Bret Walker SC (on behalf of the Hon Kezia Purick MLA, Speaker, Legislative Assembly of the Northern Territory), Submission No. 3, pp.9-10

⁴⁰ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.10

is the individual Members and the Department of the Legislative Assembly that receive funding rather than the Legislative Assembly as an entity.⁴¹

3.27 Nevertheless, the Department advised that:

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.⁴²

Committee's Comments

3.28 The Committee is satisfied with the Department's clarification and does not consider it necessary to expressly exclude the Legislative Assembly from the meaning of 'public body'. The Committee also notes that the Department further advised that in drafting the Bill:

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.⁴³

Functions of the ICAC – Referral Powers

3.29 Clause 18(3) requires that the ICAC focus its attention on dealing with matters that may involve corrupt or serious anti-democratic conduct, and that less serious matters that may involve improper conduct be referred to another entity, unless there is a good reason for the ICAC to deal with the matter.

3.30 As the Committee heard, the ICAC's referral powers are not dissimilar to those of other jurisdictions⁴⁴ and reflect Commissioner Martin's view that:

the NT Commissioner should possess a wide and unfettered discretion to accept or reject a complaint or report and to undertake an investigation or refer a matter to an agency for that purpose. Similarly, the discretion to cease an investigation and either dismiss the complaint or refer it to an agency should be wide and unfettered. Finally, the same type of discretion should exist to resume an investigation which had previously been discontinued or to reclaim an investigation from an agency to which it had been referred.

At the heart of the need for a broad and unfettered discretion is the public interest. Freedom to respond in this way in the public interest will not only enable the NT Anti-Corruption Commission to ensure that complaints and reports are effectively and efficiently investigated, but it will enhance public confidence in the operation of the Commission because the Commission is able to serve the public interest without undue restriction.⁴⁵

⁴¹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.10

⁴² Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.10

⁴³ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.10

⁴⁴ See for example, Mr Alan MacSparran QC, Committee Transcript, 9 October 2017, pp.7 & 9; Mr Richard Bingham, Committee Transcript, 9 October 2017, pp.17 & 19.

⁴⁵ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p.185

- 3.31 However, East Arnhem Regional Council raised concerns regarding the potential impact ICAC referrals may have on the financial and human resources of public bodies.⁴⁶ Noting that clause 18(4) provides 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 ICAC's functions', the Council suggested that this clause be expanded to provide that it is also a good reason for the ICAC not to refer a matter if doing so 'may adversely affect the performance or future performance of the other entity, particularly a public body.'⁴⁷
- 3.32 The Committee understands that the suggestion to amend clause 18(4) was considered by the Department during the public consultation phase of the Bill's development, but was considered unnecessary given that clause 3(a) of Schedule 1 requires that the ICAC take into account the impact of its activities on 'the ability and capacity of public officers and public bodies to perform their functions.'⁴⁸ Clause 26 also provides that the ICAC may consult a referral entity in deciding whether to make a referral which, as East Arnhem Regional Council acknowledged, may well provide an opportunity to raise any issues of concern.⁴⁹
- 3.33 Pursuant to clause 28(4), the Committee notes that 'a referral entity is not obliged to comply with a direction of the ICAC to the extent that compliance is beyond the power, or incompatible with the functions, of the referral entity.' Clause 38 of the Bill also provides for the ICAC to enter into an agreement with a referral entity to conduct a joint investigation.
- 3.34 The Department further advised that:
- 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 that 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.⁵⁰
- 3.35 While the Committee understands that the ICAC's referral powers essentially formalise an existing process, Mr Peter Shoyer (Ombudsman NT) and Mr Craig

⁴⁶ East Arnhem Regional Council, Submission No. 5, pp.1-2

⁴⁷ East Arnhem Regional Council, Submission No. 5, pp.5-7

⁴⁸ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, pp.13-14

⁴⁹ East Arnhem Regional Council, Submission No. 5, p.6

⁵⁰ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.15

Allen (Commissioner for Public Employment) acknowledged that such referrals can raise issues for smaller agencies.

Certainly in relation to Ombudsman complaints, we take the view that every agency is responsible for the conduct of its business and on a lot of occasions we will refer a matter back for investigation or for the agency to deal with it in the first place.

Now that does raise issues for small agencies being able to respond to more complex matters and that is something that I think the Commissioner, as with our office, has to work through with those individual agencies. It is something to be borne in mind though in terms of the relevant allocation of resources to agencies and I do not think anyone would expect a small agency or a local council to undertake a major investigation by itself. In those circumstances, the Commissioner will need to look at, well, who is the best body to actually run this investigation. It may require cooperation from that particular council or department or agency, but at the end of the day, it is something you need to sort out in an individual case. You need to have the flexibility there to be able to refer the matter back.⁵¹

- 3.36 The Hon Bruce Lander QC queried whether use of the term ‘another entity’ rather than ‘referral entity’ in clause 18 was a typographical error. As written, Mr Lander noted that it suggests that “another entity must be something other than a referral entity.”⁵² To remove any ambiguity, the Department acknowledged that it might be prudent to amend the clause.⁵³

Committee’s Comments

- 3.37 While acknowledging the concerns expressed by witnesses regarding potential resourcing implications for smaller agencies that may arise from ICAC referrals, the Committee is satisfied that:

the Bill as drafted provides a framework which encourages reasonable discussions and negotiations, which is a common sense approach to resolving resourcing issues.⁵⁴

- 3.38 With regards to Mr Lander’s comments, the Committee agrees that to avoid any ambiguity reference to ‘another entity’ in clause 18 should be removed and replaced by the term ‘referral entity.’

Recommendation 3

The Committee recommends that to avoid any ambiguity, the words ‘another entity’ in clauses 18(1)(c)(iv), 18(3)(b), 18(4) and clause 4(g) of Schedule 1 be removed and replaced with the words ‘referral entity’.

⁵¹ Mr Peter Shoyer, Committee Transcript, 9 October 2017, pp.27-8; see also Mr Craig Allen, Committee Transcript, 9 October 2017, p.28

⁵² Hon Bruce Lander QC, Committee Transcript, 9 October 2017, p.15

⁵³ Ms Caroline Heske, Committee Transcript, 9 October 2017, p.47

⁵⁴ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.14

Mandatory Reporting of Suspected Improper Conduct

- 3.39 Clause 22 requires that the ICAC establish a system for mandatory reporting of suspected improper conduct by ‘public bodies’ and ‘public officers’. Mr Alan MacSporran QC, noted that the Bill does not provide any corporations law displacement provisions for the purposes of section 5G of the *Corporations Act 2001* (Cth), thereby enabling Government Owned Corporations as ‘public bodies’ to lawfully comply with mandatory reporting obligations despite constraints imposed by section 1317AE of that Act relating to confidentiality requirements.⁵⁵
- 3.40 While section 6(1) of the *Government Owned Corporations Act* is such a displacement provision, this Act only applies to the Power and Water Corporation, Territory Generation and Jacana Energy. As such, the Department acknowledged that there is a need for a corporations law displacement provision to account for corporations created under other Territory statutes, or corporations registered under the *Corporations Act 2001* (Cth) that public bodies such as Local Government Councils may own, or contract service providers and grant recipients who may be corporations.
- 3.41 Given the above, the Department advised that:

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*.⁵⁶

Committee’s Comments

- 3.42 The Committee agrees that it is clearly evident that a comprehensive corporations law displacement provision is required to facilitate implementation of the ICAC’s mandatory reporting requirements with respect to ‘public bodies’ that might be incorporated. However, as further advised by the Department, the Committee notes that “such a displacement provision requires consultation with the Commonwealth and the other States and the ACT.”⁵⁷
- 3.43 To avoid the need for the Bill to come back before the Assembly once the necessary approvals have been obtained, the Committee suggests that the Bill be amended to include a corporations law displacement provision but that the provision not be commenced until the required agreement by the Commonwealth, States and the ACT is received.

⁵⁵ Crime and Corruption Commission QLD, Submission No. 7, p.2

⁵⁶ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.16

⁵⁷ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.16

Recommendation 4

The Committee recommends that:

- (a) clause 22 be amended to include a corporations law displacement provision for the purposes of the *Corporations Act 2001 (Cth)*, section 5G, in relation to section 1317AE of that Act to accommodate corporations that fall within the Bill's definition of a 'public body', noting that commencement of the provision is subject to agreement by the Commonwealth, States and the ACT; and
- (b) the Government commence processes to enable a comprehensive corporations law displacement provision to be enacted.

Public Inquiries

3.44 Part 3, Division 6 provides for public inquiries. Given the potential for public inquiries to cause irremediable damage to the reputation of those caught up in them, regardless of the findings of any subsequent report, the Hon Bruce Lander QC noted that:

In my view where a body is primarily an investigative body it is not appropriate to conduct that investigation in public. If however the body is constituted for the purpose of making a determination as to whether particular conduct other than criminal conduct has occurred then it would be appropriate in my opinion to allow the body to conduct its investigation and its hearing in public. This distinction is critical and depends upon the function which is to be performed by the body. The distinction is not clear in the Bill.⁵⁸

3.45 Following consideration of the different approaches taken elsewhere in Australia, Commissioner Martin concluded that:

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

In my view, the default position should be private inquiry unless, broadly speaking, it is in the public interest to conduct a public inquiry. The test of 'public interest' should be accompanied by a requirement to take into account whether a public inquiry might cause undue hardship to any person and a legislative direction that possible prejudice to a future prosecution is a factor tending against the holding of a public hearing. Guidance could also be taken from s31(2) of the New South Wales legislation.⁵⁹

3.46 Clause 39 of the Bill empowers the ICAC to hold a public inquiry for an investigation. However, clause 5 of Schedule 2 states that matters should be dealt with in private, unless it is in the public interest to do otherwise, and requires that a number of factors be considered when making such a determination –

⁵⁸ Independent Commissioner Against Corruption SA, Submission No. 8, p.5

⁵⁹ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p.128

including undue hardship and similar provisions to s31(2) of the *Independent Commission Against Corruption Act 1988* (NSW).

3.47 It is further noted that for a public inquiry, clause 46 provides for the ICAC to make directions that: the inquiry, or part of it be held in private; publication of information or evidence be prohibited or restricted; or a person be excluded from all or part of the inquiry. Clause 147 creates an offence for contravening a direction under this section.

3.48 While noting that the Bill evidently seeks to strike a balance between the public interest and the protection of individual rights, Professor Aughterson was, nevertheless, concerned that:

while clause 46(a) allows the ICAC to hold part of a public hearing in private, there is potential for self-incriminating evidence to emerge at a public hearing, which can have an adverse effect on any subsequent trial. While clause 46(c) allows the ICAC to give a direction prohibiting the publication of evidence given at an inquiry, it is not certain how effective that will be where there is a public hearing in a relatively small community. It might assist if provision were made requiring the ICAC to advise the person of a right to request that at least some answers to questions be given in closed session. It could remain that the final decision as to whether any session be closed rests with the ICAC.⁶⁰

3.49 The Department advised that clause 80(3) of the Bill provides that a witness at a public hearing is entitled to refuse or fail to answer questions on the ground of self-incrimination in relation to an offence that the ICAC has deemed is not materially relevant to the matter under investigation. Similarly, clause 80(4) provides that a witness may make a submission to the ICAC as to whether such applies in a closed session.⁶¹

3.50 The Department considered that incorporation of a formal 'caution' to this effect ahead of a witness giving evidence in a public hearing was not necessary since:

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. 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.⁶²

3.51 The Department further noted that should the Committee consider it preferable, clause 41 could be amended such that the written notice requiring attendance for examination make mention of this right. Alternatively, a clause could be

⁶⁰ Professor Aughterson, *Review of the ICAC Bill*, (unpublished) 2 October 2017, pp.6-7

⁶¹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p. 21

⁶² Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p. 21

inserted requiring that a witness be advised of the right prior to giving evidence in a public inquiry.⁶³

Committee's Comments

3.52 The Committee notes that the Department's advice does not entirely address the issue raised by Professor Aughterson. As pointed out in his advice to the Committee:

the protection afforded by clause 80(3) is limited, as it remains that criminal charges could flow from the alleged improper conduct that is the subject of the public inquiry.⁶⁴

3.53 Professor Aughterson proposed that witnesses be afforded a similar right to protection as those appearing before a Committee of the Legislative Assembly. Clause 7 of Standing Order 210 regarding '*Procedures to be followed by Assembly Committees for the Protection of Witnesses*' provides that:

a witness will be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in private session, and will be invited to give reasons for any such application. If the application is not granted, the witness will be notified of the reasons for that decision.⁶⁵

While this advice is included in notices to attend hearings, it is also reiterated by the Chair before the commencement of a hearing.

3.54 As currently drafted the Committee does not consider the Bill affords witnesses an appropriate level of protection and, given the removal of the privilege against self-incrimination at clause 80, fails to have sufficient regard for the rights of the individual. The Committee is of the view that the ICAC should be required to advise witnesses of their rights in relation to clause 80(3) and the more general right to request that at least part of their evidence be given in private in both the written notice requiring attendance before the ICAC and prior to the commencement of hearings.

Recommendation 5

The Committee recommends that the Bill be amended to give witnesses a right to apply for a direction for a private hearing or non-publication under clause 46; and require that the ICAC advise witnesses in the notice requiring attendance and in an open session before giving evidence of:

- (a) their right to make application, before or during an open session, for a direction under clause 46 regarding directions for private hearing and non-publication; and**

⁶³ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p. 21

⁶⁴ Professor Aughterson, *Review of the ICAC Bill*, (unpublished) 2 October 2017, footnote 26, p.6

⁶⁵ Legislative Assembly of the Northern Territory, *Standing Orders*, In force as of 21 April 2016, p.61-2, <https://parliament.nt.gov.au/business/standing-and-sessional-orders>

(b) their rights under clauses 80(3) and 80(4) regarding privilege against self-incrimination.

Reports

3.55 A number of submissions sought clarification regarding various aspects of the Bill's reporting provisions.⁶⁶ As the Hon Bruce Lander QC concluded, "the reports that may be made and have to be made in Division 7 of Part 3, may lead to confusion in the manner in which ICAC (NT) deals with investigations into criminal conduct."⁶⁷ The Committee notes that, to some extent, comments regarding the proposed reporting regime would appear to stem from the fact that, unlike legislation in other jurisdictions, the Bill provides for a wide range of reporting options.⁶⁸

3.56 While the Bill incorporates eight distinct reporting formats, the Department notes that:

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.⁶⁹

3.57 Nevertheless, Mr Alan MacSporran QC notes that, 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.

The Bill does not expressly empower ICAC to make comment or findings in regard to s.49 investigation reports. It is acknowledged that s.19 of the Bill empowers ICAC to do all things necessary or convenient to be done in relation to the performance of its functions. ... It is also acknowledged that s.55 of the Bill enables the ICAC to make recommendations and provide information to help others understand the purpose of the recommendations.

The CCC similarly has a broad express power to make recommendations and, most importantly, comment on all matters which it is aware that support, or oppose or are otherwise relevant to its recommendations. The CCC considers this expressly stated power provides clarity for those who may seek to challenge the legal basis for such comments. This substantially limits the grounds upon which reports may be challenged to matters of fairness, independence and the public interest.

The Committee may wish to consider whether the s.49 power might be appropriately adapted to include a broader express power to comment or make findings with respect to matters directly related to non-public inquiry reports.⁷⁰

⁶⁶ See for example, Professor Aughterson, *Review of the ICAC Bill*, (unpublished) 2 October 2017, pp.4-5; Crime and Corruption Commission QLD, Submission No. 7, pp.3-4; Independent Commissioner Against Corruption, Submission No. 8, pp.5-7

⁶⁷ Independent Commissioner Against Corruption SA, Submission No. 8, p.6

⁶⁸ s42 Independent Commissioner Against Corruption Act 2013 (SA); ss64-5 *Crime and Corruption Act 2001* (QLD); s162 *Independent Broad-based Anti-corruption Commission Act 2011* (VIC); ss45ZA-ZB *Corruption, Crime and Misconduct Act 2003* (WA); s74 *Independent Commission Against Corruption Act 1988* (NSW); s12 *Crime Commission Act 2012* (NSW); s 55 *Integrity Commission Act 2009* (TAS)

⁶⁹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.22

⁷⁰ Crime and Corruption Commission QLD, Submission No. 7, p.4

- 3.58 The Department agreed that Mr MacSporran’s suggested amendment “appears to be a sensible addition to clause 49 to minimise the risk of unnecessary challenges.”⁷¹ The Department further noted that this could be achieved quite simply through the inclusion of a clause equivalent to 51(3) and the corresponding limitations of clause 51(4).⁷²

Committee’s Comments

- 3.59 The Committee acknowledges Mr MacSporran’s suggestion and supports the amendment to clause 49 as proposed by the Department.

Recommendation 6

The Committee recommends that to minimise the risk of unnecessary legal challenges, clause 49 be amended to include:

- (a) a clause equivalent to 51(3) to include an express power to make comment or findings in an investigation report; and**
- (b) the corresponding limitations of an equivalent clause 51(4) regarding making findings on offences and breaches of discipline.**

Search Warrants

- 3.60 As discussed in relation to the remit of the ICAC, the Bill provides the power to enter and search private premises for any investigation into ‘improper conduct’ which includes not only criminal conduct but also misconduct matters and even unsatisfactory conduct matters arising from negligence. Given that a search warrant allows a significant infringement to a person’s right to privacy and property, the Hon Bruce Lander QC and Mr John Hyde (Chair: Global Organisation of Parliamentarians Against Corruption) raised concerns that, contrary to equivalent legislation elsewhere,⁷³ the Bill provides that search warrants may be issued by a Justice of the Peace.⁷⁴
- 3.61 Under clause 67(1) an authorised officer may apply to a Justice of the Peace for a search warrant if the officer ‘believes on reasonable grounds’ that entry to the premises is necessary for the purpose of an investigation. Clause 67(3) requires that before issuing a search warrant, the Justice of the Peace must be satisfied ‘by evidence on oath’ that there are indeed reasonable grounds for the belief mentioned in subsection (1).

⁷¹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.26

⁷² Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.26

⁷³ See for example, *Integrity Commission Act 2009* (TAS), s51; *Independent Commissioner Against Corruption Act 2001*, s31; *Independent Broad-Based Anti-Corruption Act 2011* (VIC), s91; *Independent Commission Against Corruption Act 1988* (NSW), s.40; *Crime Commission Act 2012* (NSW), s17; *Crime and Corruption Act 2001* (QLD), s86; *Corruption, Crime and Misconduct Act 2003* (WA), s101

⁷⁴ Independent Commissioner Against Corruption SA, Submission No. 8, p.3; Hon Bruce Lander QC, Committee Transcript, 9 October 2017, p.15; Global Organisation of Parliamentarians Against Corruption, Submission No. 1, p.1; Mr John Hyde, Committee Transcript, 9 October 2017, p.24

3.62 In determining whether or not to grant an application, Mr Lander suggests that:

one test that might be considered is whether the exercise of the power is proportionate to the gravity of the matter under investigation.⁷⁵

However, given that legal qualifications are not a prerequisite for appointment as a Justice of the Peace, there is a very real potential that:

the exercise of serious powers that are available for the investigation of less serious matters will be considered by decision makers who may not have the legal knowledge and experience to exercise the discretion which arises in clause 67(3) of the Bill.⁷⁶

3.63 The Committee notes that Commissioner Martin was of the view that:

when coercive powers are conferred, there is a need to ensure that certain rights of individuals and entities are protected or, where such rights are distinguished or diminished, that appropriate safeguards are put in place to ensure appropriate oversight of the exercise of the powers. This issue is reflected in my view that only judicial officers should be able to issue warrants.⁷⁷

3.64 Furthermore, unlike South Australia where the Commissioner is empowered to issue search warrants to enter “public premises or premises occupied by a public officer”,⁷⁸ Commissioner Martin noted that:

in respect of powers to obtain search warrants or warrants under surveillance and telecommunications legislation, in my view no one employed in the NT Anti-Corruption Commission should possess the power to issue search warrants. The exercise of such power should be reserved to a judicial officer. Some might argue that power should be reserved to a Supreme Court Judge, but in my view there is no reason why a Judge of the Local Court should not also possess that power.⁷⁹

3.65 While acknowledging that the provisions regarding search warrants are a departure from the recommendations in the Martin report, the Committee heard that it was essentially a policy decision. Given the small pool of judicial officers available in the Northern Territory, s117 of the *Police Administration Act 2017* (NT) provides for Justices of the Peace to issue search warrants. The provisions in clauses 67 and 68 are, therefore, closely aligned to those provided for under this Act.⁸⁰

3.66 While Justices of the Peace in Western Australia and Queensland are also empowered to issue search warrants for police investigations, the Committee notes that, in contrast to the Northern Territory, they are required to complete an

⁷⁵ Independent Commissioner Against Corruption SA, Submission No. 8, p.3

⁷⁶ Independent Commissioner Against Corruption SA, Submission No. 8, p.3

⁷⁷ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, pp.185-186

⁷⁸ Hon Bruce Lander QC, Committee Transcript, 9 October 2017, p.15

⁷⁹ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, pp.116-7

⁸⁰ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, pp.30-1; see also Ms Caroline Heske, Committee Transcript, 9 October 2017, p.43

accredited training course prior to their appointment.⁸¹ As Mr Hyde pointed out, it also needs to be borne in mind that:

as legislators, we give an anti-corruption body incredible powers. They have powers in many cases much superior to the police in terms of individual rights, access to information and I think there is also a requirement on us to ensure that there are checks and balances.⁸²

I am also a justice of the peace. I know many fine justices of the peace but I would think that there would need to be a strong benchmark in terms of the experience of JP's that would be able to issue a warrant for access that is proposed under your bill.⁸³

- 3.67 The Department noted that the validity of search warrants issued by Justices of the Peace was also raised as a matter of concern during the consultation phase when developing the Bill.

The Department was contacted by a senior investigator from an anti-corruption body from another jurisdiction ... 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.⁸⁴

- 3.68 Taking into consideration the concerns outlined above, the Department further noted that:

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.⁸⁵

Committee's Comments

- 3.69 The Committee shares the concerns expressed by the Hon Bruce Lander QC and Mr John Hyde and agrees with Commissioner Martin that search warrants should only be issued by judicial officers.

- 3.70 The Committee further notes that the standard for having sufficient regard to the rights and liberties of individuals set out in its terms of reference is that a bill:

⁸¹ Department of Justice and the Attorney-General, *Handbook: Duties of Justices of the Peace (Qualified)*, Queensland Government, Brisbane Qld, the State of Queensland (Department of the Premier and Cabinet) 2017; Department of the Attorney General, *Handbook for Justices of the Peace*, Perth WA, Government of Western Australia, 2017; see also Department of Justice, *Training for Justices of the Peace*, http://www.courts.dotag.wa.gov.au/U/upcoming_jp_training.aspx?uid=7734-1663-6243-4651

⁸² Mr John Hyde, Committee Transcript, 9 October 2017, p.23

⁸³ Mr John Hyde, Committee Transcript, 9 October 2017, p.24

⁸⁴ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.30

⁸⁵ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, pp.30-1

confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

- 3.71 Any deviation from this standard requires clear and strong justification in the public interest. In this case the justifications may be summarised as not wanting to deviate from the existing practice with police warrants; concern about the difficulty of accessing a judicial officer at certain times; and an explanation that Justices of the Peace would not usually be asked to issue search warrants as this could lead to warrants being challenged.
- 3.72 Given the extraordinary powers of the ICAC, the Committee does not consider it follows that it should have the same warrant processes as the police. It is noted that pursuant to s18 of the *Surveillance Devices Act 2017* (NT) warrants may generally only be issued by a Supreme Court, with Local Court Judges only permitted to issue warrants in specified circumstances.⁸⁶
- 3.73 Further, the Committee questions whether it remains appropriate for Justices of the Peace to be issuing search warrants for police. It is doubtful whether the conditions that may have justified a process in 1979 when the Act was passed still prevail today. The Committee therefore considers that the Justices of the Peace's power to issue search warrants for police should be reviewed.
- 3.74 The Committee also considers that the usual safeguards on individual rights take priority over administrative convenience. No evidence was provided that limited availability of judicial officers made reliance on them unworkable. The Committee also notes that the concerns around the reliability of warrants issued by a Justice of the Peace highlights the inappropriateness of this process.
- 3.75 The Committee therefore concludes that only judicial officers should be able to issue search warrants for the ICAC and the processes for the issuing of search warrants in the Northern Territory should be reviewed.

Recommendation 7

The Committee recommends that:

- 1. clauses 67 and 68 be amended by removing the words 'Justice of the Peace' and replacing them with the words 'Judicial Officer'.**
- 2. the Department of the Attorney-General and Justice undertake a review of processes for the issuing of search warrants in the Northern Territory.**

Client Legal Privilege

- 3.76 Under clause 78(3) where information is provided to the ICAC that would, if it were not for clause 78(1)(c), attract client legal privilege, the ICAC must not make the information public. Professor Aughterson noted that "it is not clear how that

⁸⁶ *Surveillance Devices Act 2017* (NT), s18

is achieved where evidence emerges at an ‘open session’ as defined in clause 77”⁸⁷

- 3.77 The Department advised that it was of the view that, in practice, it would be highly unlikely that the evidence would emerge at an open session for the following reasons:

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.

Secondly, ... a public inquiry is a tool used within an investigation ... 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.

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*.⁸⁸

Committee’s Comments

- 3.78 The Committee is satisfied with the clarification provided by the Department and is of the view that the Bill provides appropriate mechanisms to guard against the publication of information that may attract client legal privilege.

Privilege Against Self-Incrimination

- 3.79 The following points provide an overview of matters that the Committee took into consideration with regards to its examination of clauses 80 and 81 relating to the compelling and subsequent use of evidence.
- 3.80 The privilege against self-incrimination provides that a person cannot be compelled to give evidence or produce documents that may tend to, directly or indirectly, expose them to a criminal charge or the imposition of a penalty, or impede their right to a fair trial.

⁸⁷ Professor Ned Aughterson, *Review of the ICAC Bill*, (unpublished) 2 October 2017, p.5

⁸⁸ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, pp.32-3

[It] is based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself.⁸⁹

3.81 The privilege has been described as:

a cardinal principle of our system of justice, a bulwark of liberty, fundamental to a civilised legal system and an integral part of international human rights law.⁹⁰

Importantly, the High Court has cited power imbalance as a specific reason for ensuring the maintenance of the privilege against self-incrimination.

This is particularly the case in relation to the State's powers of investigation. Police have the right to obtain a warrant and seize documents and other evidence. They can take someone's fingerprints or other bodily samples and can force an accused to participate in a line-up procedure. The State has financial and other resources not available to the individual. This must not be forgotten as it is relevant to the issue of whether the State should be given even greater powers to compel evidence directly from the accused.⁹¹

3.82 Nevertheless, there are a range of agencies in Australia that are empowered to conduct coercive information-gathering investigations that deny the privilege against self-incrimination. As the Australian Law Reform Commission has noted:

the justifications for these encroachments will necessarily vary depending on the particular area of law. Generally, they have been justified on public interest grounds to promote the investigation of and to prevent unlawful practices such as tax evasion, corruption and environmental pollution and degradation.⁹²

Commissioner Martin took the view that the abrogation of the privilege against self-incrimination is "an essential tool in the armoury of an anti-corruption body and it should apply in the Territory."⁹³

3.83 However, since removal of the privilege represents a significant loss of personal liberty, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* indicates that where a law excludes the privilege, it is usual to include a direct use (often referred to simply as 'use') immunity or a derivative use immunity.⁹⁴

⁸⁹ Office of the Queensland Parliamentary Counsel, *Principles of Good Legislation: OQPC Guide to FLPS – Self-incrimination*, Office of the Queensland Parliamentary Counsel, Brisbane Qld, June 2013, p.5

⁹⁰ Dan Rogers, *Coercion in Crime Commissions and the Abrogation of the Privilege Against Self-Incrimination*, 2012, p.4, <http://www.robertsonogorman.com.au/media/2053/Coercion-in-Crime-Commissions-and-the-Abrogation-of-the-Privilege-against-Self-incrimination.pdf>; see also *International Covenant on Civil and Political Rights*, 23 March 1976, Article 14(3)(g), <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>

⁹¹ Dan Rogers, *Coercion in Crime Commissions and the Abrogation of the Privilege Against Self-Incrimination*, 2012, p.8, <http://www.robertsonogorman.com.au/media/2053/Coercion-in-Crime-Commissions-and-the-Abrogation-of-the-Privilege-against-Self-incrimination.pdf>

⁹² Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Commonwealth of Australia, Sydney NSW, December 2015, p.352

⁹³ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p.199

⁹⁴ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, 2011, pp.95-8
<https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

A 'direct use' immunity prevents the admission of evidence or information obtained through compulsion. This immunity alone has severe limitations because there is the possibility that the answer may involve the disclosure of a defence or lead to the discovery of other evidence, these being consequences against which a person charged with a criminal offence is usually entitled to be protected. A 'derivative use immunity' goes one step further and also protects against the use of information to uncover other evidence against the individual.⁹⁵

Commissioner Martin also acknowledged the importance of ensuring appropriate protections were allied with the removal of the privilege.⁹⁶

3.84 The Commonwealth Parliamentary Joint Committee on Human Rights, has noted that:

an abrogation of the privilege [against self-incrimination] is more likely to be considered permissible if it is accompanied by both a use and derivative use immunity.⁹⁷

Compelling Evidence

3.85 Clause 80(2) provides that where a witness is currently 'charged with, or facing criminal proceedings for' an offence, they are entitled to refuse to give evidence on the grounds that it might incriminate them in relation to the offence. Mr Alan MacSporran QC noted that this clause "will likely prevent the ICAC from properly examining persons charged with offences for legitimate purposes concerning the improper conduct of others."⁹⁸

3.86 Given that this may well be contrary to the public interest, Mr MacSporran queried whether any consideration had been given to the inclusion of provisions similar to section 331 of the *Crime and Corruption Act 2001* (QLD):

The CCC considers the appropriate balancing of individual rights and the public interest is better determined by having regard to the circumstances of each particular case in the light of available evidence. Section 331 of the CC Act provides a robust mechanism to allow CCC investigations to proceed and examine any witness (including those charged with an offence) in closed investigation hearings. Indeed CCC investigations have benefited substantially by the operation of s.331 of the CC Act in managing closed hearings in ways that have had proper regard for the protection of individual rights and the public interest. This promotes public confidence and supports timely and effective investigations.⁹⁹

3.87 Section 331 of the *Crime and Corruption Act 2001* (QLD) seeks to displace the 'companion rule'. As noted above, a fundamental principle of the adversarial criminal trial is that the burden of proof is on the prosecution. The 'companion

⁹⁵ Dan Rogers, *Coercion in Crime Commissions and the Abrogation of the Privilege Against Self-Incrimination*, 2012, p.5, <http://www.robertsonogorman.com.au/media/2053/Coercion-in-Crime-Commissions-and-the-Abrogation-of-the-Privilege-against-Self-incrimination.pdf>

⁹⁶ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p.200

⁹⁷ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Commonwealth of Australia, Sydney NSW, December 2015, p.360

⁹⁸ Crime and Corruption Commission QLD, Submission No. 7, p.3

⁹⁹ Crime and Corruption Commission QLD, Submission No. 7, p.3

rule' to this principle is that the accused cannot, therefore, be compelled to assist in the discharge of that burden.¹⁰⁰

3.88 In light of a number of High Court cases involving examinations by crime commissions and the self-incrimination privilege, the Department advised that:

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. 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.¹⁰¹

3.89 Given the above, and noting that the validity of s331 has not yet been confirmed by the High Court, the Department further advised that:

clause 80(2) was therefore drafted to prohibit questioning of 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 they will be constitutionally valid if the High Court continues to move in the direction some are anticipating they will move.¹⁰²

Committee's Comments

3.90 The Committee is satisfied with the Department's explanation.

Removal of Ambiguity – Clause 80(2)

3.91 Given the preceding discussion, the Hon Bruce Lander QC raised concerns regarding the meaning of the phrase 'or facing criminal proceedings for' in clause 80(2) and the intent behind its inclusion.

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

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

I consider that unless the phrase 'facing criminal proceedings ... for an offence' is defined or removed it may bring uncertainty to the prosecution of some criminal matters arising out of investigations conducted by an ICAC (NT).¹⁰³

¹⁰⁰ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.18

¹⁰¹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.19

¹⁰² Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.19

¹⁰³ Independent Commissioner Against Corruption SA, Submission No. 8, p.7

- 3.92 Acknowledging Mr Lander's point, the Department advised that the Committee may wish to propose an amendment to remove the phrase noting that:

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.¹⁰⁴

Committee's Comments

- 3.93 To avoid the potential of a legal challenge with regards to a claim of privilege against self-incrimination by witnesses that may be a suspect in an investigation, but have not been charged with an offence, the Committee agrees that clause 80(2) should be amended to remove the words 'or facing criminal proceedings for'.

Recommendation 8

The Committee recommends that to avoid any potential of a legal challenge, clause 80(2) be amended by removing the words 'or facing criminal proceedings for'.

Subsequent Use of Representations Made by Witness

- 3.94 Clause 80 enables the ICAC to compel a person who has not been charged with an offence to incriminate themselves, but clause 81(1) provides a use immunity making such evidence inadmissible in civil, criminal or disciplinary proceedings against the person, except for proceedings for an offence against the ICAC Act. As noted previously, such a limitation, and corresponding protection of the right against self-incrimination has many precedents and is a common feature of anti-corruption legislation.¹⁰⁵ However, clause 81(6) allows the ICAC to provide information a person was compelled to give that tends to incriminate themselves regarding an indictable offence to a prosecuting authority.
- 3.95 As pointed out by Professor Aughterson, this would appear to be a significant abrogation of the right against self-incrimination and noted that in considering similar provisions under the *NSW Crime Commission Act 1985* the High Court expressed the view that:

where there is a subsequent criminal hearing this alters the balance of rights between the prosecution and defence, given the adversarial nature of our legal system and the entitlement of the accused to require the prosecution to prove its case ... giving the prosecution evidence that the accused could not be compelled to give at their trial, adversely affects the manner in which

¹⁰⁴ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.33

¹⁰⁵ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, pp.199-201

the accused can conduct their defence and alters their right to a fair trial in a fundamental respect.¹⁰⁶

3.96 Given this, Professor Aughterson queried whether clause 81(6) should be expanded to restrict disclosure generally, thereby affording witnesses similar protection to that provided for under what is now s45 of the *Crime Commission Act 2012* (NSW), noting that “it would remain that, because of clause 153, the court could allow disclosure in an appropriate case.”¹⁰⁷

3.97 In contrast to the proposed clause 81(6), the Committee notes that ss39 and 39A of the NSW legislation provide for use and derivative use immunity and s45(2) requires that the Commission must give a direction that evidence must not be published or disclosed:

if the failure to [give such a direction] might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence.¹⁰⁸

Moreover, contravention of such a direction is an offence with a maximum penalty of 100 penalty units or 2 years imprisonment, or both.¹⁰⁹

3.98 Recommendation 17 of the Martin Report states 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.¹¹⁰

3.99 Nevertheless, in response to the Committee’s questions on this matter, and noting in particular an intention to comply with this recommendation, the Department advised that:

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.¹¹¹

3.100 However, Commissioner Martin did not recommend such subsequent use but identified such an abrogation of the privilege against self-incrimination as a policy question for the Assembly.

What if the information compulsorily obtained leads to useful lines of inquiry which provide evidence of other offences? If they are ‘incidental’ offences relating to the matter under investigation by the Commission, there would not appear to be any reason why the Commission should not be entitled to use such evidence for its purposes. However, what if unrelated offences are disclosed? Should other law enforcement authorities be able to use such evidence in pursuing investigations into the unrelated offences? Where to draw the line is a difficult question of policy.¹¹²

¹⁰⁶ Professor Aughterson, *Review of the ICAC Bill*, (unpublished) 2 October 2017, p.6

¹⁰⁷ Professor Aughterson, *Review of the ICAC Bill*, (unpublished) 2 October 2017, p.6

¹⁰⁸ *Crime Commission Act 2012* (NSW), s45(2)

¹⁰⁹ *Crime Commission Act 2012* (NSW), s45(3)

¹¹⁰ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p.12

¹¹¹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.34

¹¹² Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p.208

In summary, therefore, information compulsorily obtained, or subsequently discovered as a consequence of such information, should be available for use by the NT Anti-Corruption Commission in performing its functions. As to the use in criminal or other proceedings, this is a question of policy to be resolved by the Assembly.¹¹³

3.101 In 2014 Attorney-General, the Hon George Brandis QC, directed the Australian Law Reform Commission to undertake a *Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges*. With regards to the privilege against self-incrimination, the Commission concluded that:

there have been several reviews of the privilege against self-incrimination and the availability of use immunities to protect witnesses who are compelled to produce evidence or attend examinations. These reviews largely concluded that use and derivative use immunities are an appropriate safeguard of individual rights and may, therefore, appropriately justify laws that exclude the privilege against self-incrimination.¹¹⁴

3.102 The Committee notes that, with the exception of South Australia, equivalent legislation in all other Australian jurisdictions provide for use and derivative use immunities in relation to evidence that has been obtained compulsorily.¹¹⁵ In light of recent High Court cases, the Office of the Queensland Parliamentary Counsel notes that, in accordance with the *Legislative Standards Act 1992 (QLD)*¹¹⁶:

if the privilege [against self-incrimination] is to be abrogated by statute it should give the same immunity to the evidence that 'otherwise would have been privileged'. As such, if a statute abrogates the privilege a use and derivative use immunity should be provided. ... The only exception generally to the use and derivative use immunity is in proceedings relating to the falsity of the evidence provided.¹¹⁷

Committee's Comments

3.103 In accordance with its terms of reference, the Committee is required to determine whether a bill has sufficient regard to the rights and liberties of individuals, including whether a bill 'provides appropriate protection against self-incrimination.' As currently drafted, the Committee agrees with Professor Aughterson that clause 81(6) is a significant abrogation of such. The question for the Legislative Assembly is whether this abrogation is justified.

3.104 The Committee considers that any abrogation of the right against self-incrimination should not go beyond that required for a legitimate public purpose. The Committee is satisfied that this abrogation is justified for the purpose of the ICAC to investigate and eliminate corruption, as is the practice in many

¹¹³ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p.210

¹¹⁴ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Commonwealth of Australia, Sydney NSW, December 2015, p.363

¹¹⁵ *Corruption, Crime and Misconduct Act 2003 (WA)*, ss 124, 151; *Crime and Corruption Act 2001 (QLD)*, s197; *Crime Commission Act 2012 (NSW)*, ss39, 39A, 45; *Independent Broad-Based Anti-Corruption Commission Act 2011 (VIC)*, s.144; *Independent Commission Against Corruption Act 1988 (NS)*, s.26. Note: the *Integrity Commission Act 2009* does not abrogate the privilege against self-incrimination

¹¹⁶ *Legislative Standards Act 1992 (QLD)*, s.4

¹¹⁷ Office of the Queensland Parliamentary Counsel, *Principles of Good Legislation: OQPC Guide to FLPS – Self-incrimination*, Office of the Queensland Parliamentary Counsel, Brisbane Qld, June 2013, p.12

jurisdictions. However, abrogating the right in order to assist a criminal investigation is a more serious matter as it directly affects the rights of the accused against the prosecution. Such an abrogation requires clear and compelling justification. That it makes prosecution easier is not a compelling reason for abrogating this right.

3.105 The Committee is concerned that the Department gave as the reason for abrogating the derivative use immunity the decision to comply with Commissioner Martin's recommendations, given that Commissioner Martin did not recommend allowing derivative use but rather noted that allowing such is a difficult question of policy.

3.106 Without a clear and compelling case for abrogating the derivative use immunity, the Committee considers that it should not be allowed.

Recommendation 9

The Committee alerts the Assembly to the significant abrogation of the privilege against self-incrimination by allowing the ICAC to pass compelled self-incriminating evidence on to a prosecuting authority as provided for in clause 81(6) and recommends that the Assembly consider whether this abrogation of the fundamental right against self-incrimination is justified.

Parliamentary Privilege and the Separation of Powers

3.107 Mr Bret Walker SC raised concerns regarding the application of clause 12 (meaning of *unsatisfactory conduct*) to Members of the Legislative Assembly.¹¹⁸ By way of background, Mr Walker notes that under s12 of the *Northern Territory (Self-Government) Act 1978* (Cth) the Legislative Assembly is empowered to:

declare its own non-legislative powers, privileges and immunities (including that of its Members), but not exceeding those of the House of Representatives. That power extends to 'providing for the manner in which' those powers etc. 'may be exercised or upheld.' This legislative power has been exercised, amongst other ways, by the enactment of sec 4 of the *Legislative Assembly (Powers and Privileges) Act* (NT). Relevantly, it renders those powers etc. the equivalent to those 'for the time being of the House of Representatives of the Commonwealth...'¹¹⁹

3.108 Importantly, Mr Walker points out that pursuant to s49 of the *Commonwealth Constitution Act* and s5 of the *Parliamentary Privileges Act 1987* (Cth):

the House of Representatives, beyond any possibility of dispute, has the capacity to adjudge for itself the question whether one of its Members has conducted himself or herself in breach of the standards which, in the public interest, are required of a Member of the House Representatives.¹²⁰

¹¹⁸ Mr Bret Walker SC, Submission No. 3, p.7-8

¹¹⁹ Mr Bret Walker SC, Submission No. 3, p.2

¹²⁰ Mr Bret Walker SC, Submission No. 3, p.2

3.109 It is, however, acknowledged that it is a long-established proposition that parliamentary privilege is not claimable for any indictable offences. Mr Walker is, therefore, of the view that:

allegations of criminal misconduct by Members as such can reasonably be regarded as appropriate to be considered by the proposed ICAC, whereas conduct of Members as such calling for censure without being criminal can reasonably be regarded as inappropriate for consideration by the proposed ICAC rather than the Legislative Assembly itself.¹²¹

3.110 However, “notwithstanding the notorious reality of improper, negligent and incompetent judges,”¹²² it is noted that clause 12(3) excludes judicial officers in the performance of judicial functions from falling within ‘unsatisfactory conduct’, thereby recognising the institutional integrity of the judiciary in its relations with the executive and executive agencies. Given the above, Mr Walker suggested that:

perhaps a similar caution should be emulated in relation to the position of Members in their conduct as such. After all, it could scarcely be supposed that the ICAC will be as good a place to articulate and enforce such standards as the House itself, let alone would be a better place to do so.¹²³

3.111 While noting that “no person should be exempt from investigation of an allegation of corruption in relation to the administration of public affairs”,¹²⁴ Commissioner Martin further noted that:

judicial independence and parliamentary privilege should be maintained. The boundaries in relation to Parliamentary Privilege should be clearly defined. ... in relation to judicial officers and MLAs, if an allegation is made of conduct falling short of corruption such as maladministration or misconduct ... ordinarily the NT Anti-corruption Commission should not conduct such investigations. Such allegations concerning judicial officers should be referred to the Chief Justice or Chief Judge as appropriate or, in the case of an allegation concerning the Chief Justice, to the Attorney-General. Less serious matters relating to MLAs should be referred to the Speaker.¹²⁵

3.112 Clause 2(d) of Schedule 1 requires that in performing its functions the ICAC should take into account the ‘separation of powers, including the independence of the judiciary and the Legislative Assembly’s right to control its own affairs.’ However, the inclusion of MLAs in the application of clause 12 would seem to contradict this provision and brings into question how the ICAC Bill sits with the *Legislative Assembly (Members’ Code of Conduct and Ethical Standards) Act 2008* (NT). This Act provides a Code which ‘establishes principles of ethical conduct, and standards of behaviour, for members’ and for enforcement of that Code through investigation by the Privileges Committee and any punishment for breaches to be imposed by the Assembly.¹²⁶

¹²¹ Mr Bret Walker SC, Submission No. 3, p.11

¹²² Mr Bret Walker SC, Submission No. 3, p.8

¹²³ Mr Bret Walker SC, Submission No. 3, p.8

¹²⁴ Hon BR Martin, Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016, Department of the Chief Minister, Darwin NT, 2016, p.111

¹²⁵ Hon BR Martin, Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016, Department of the Chief Minister, Darwin NT, 2016, p.111

¹²⁶ *Legislative Assembly (Members’ Code of Conduct and Ethical Standards) Act 2008* (NT)

3.113 As currently drafted, the Committee is concerned that the boundaries in relation to parliamentary privilege and the Assembly's right to control its own affairs are not clearly defined and gives rise to the potential for a:

very substantial infringement on the autonomy and dignity of the House and its Members, who simply should not be told by an outside authority, constitutionally located in the executive administration (albeit independent), how to conduct their exercise of official function.¹²⁷

3.114 The Department advised that while clause 12(3) is about maintaining judicial independence:

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.¹²⁸

Nevertheless, the Committee notes that the appeals process is subject to a wide range of factors, not the least of which being the wherewithal of prospective appellants. As such it does not necessarily provide a guaranteed forum in which to deal with instances of unsatisfactory conduct on the part of judicial officers in the performance of judicial functions.

3.115 The Department further advised that:

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.¹²⁹

3.116 However, the Committee notes that the Bill contains an explicit statutory provision limiting parliamentary privilege in clause 82, which provides that:

- (1) Parliamentary privilege is limited to the extent that it would otherwise prevent any of the following:
 - (a) a person alleging under this Act that an MLA has engaged or is engaging in improper conduct;
 - (b) the ICAC's investigation of an allegation mentioned in paragraph (a), whether or not the allegation is also the subject of a referral to the Speaker or Deputy Speaker;
 - (c) the ICAC making findings in relation to an allegation mentioned in paragraph (a).
- (2) Subsection (1) does not limit parliamentary privilege in relation to evidence that might be relevant to allegations, investigations or findings mentioned in that subsection.

¹²⁷ Mr Bret Walker SC, Submission No. 3, p.10

¹²⁸ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.9

¹²⁹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.9

- 3.117 Clause 82(1) explicitly limits parliamentary privilege to allow the ICAC to investigate and make findings in relation to ‘improper conduct’, which includes ‘unsatisfactory conduct’. This involves the ICAC determining the standards of negligence or incompetence for Members’ behaviour, in breach of established parliamentary privilege as outlined by Mr Walker. While Clause 82(2) protects the Assembly’s privilege of free speech, it does not protect the Assembly from the privilege against an executive agency prescribing the standards of satisfactory conduct for a Member.
- 3.118 Consequently, the Committee cannot agree with the Department’s statement that clause 82 “has a similar carve-out effect to section 12(3)”¹³⁰, effectively inhibiting the ICAC’s ability to progress investigating an allegation that would breach parliamentary privilege.¹³¹ While clause 82(2) may provide an evidentiary barrier regarding parliamentary proceedings, clause 81(1) still provides the ICAC a substantive role in examining the conduct of Members in breach of parliamentary privilege and the separation of powers between the Legislature and the Executive.
- 3.119 In other words, the ICAC’s ability to investigate an allegation of ‘improper conduct’ is only limited with respect to evidence which might attract parliamentary privilege, which itself may be subject to dispute and subsequent determination by the Supreme Court (see clauses 86, 88 and 89). As currently drafted, there is nothing to preclude the ICAC from investigating an MLA for corrupt conduct, misconduct or unsatisfactory conduct. Clause 82 merely limits what material can be tendered in evidence. It certainly does not have a similar carve-out effect as clause 12(3) which prevents the ICAC from investigating allegations that a judicial officer has engaged or is engaging in unsatisfactory conduct in the performance of judicial functions.
- 3.120 It is further noted that parliamentary privilege is not limited in equivalent legislation in any other Australian jurisdiction. Indeed, South Australia, Tasmania and New South Wales incorporate specific clauses to the effect that nothing in the Act affects the privileges, immunities or powers of the Assembly its committees or members.¹³²

Committee’s Comments

- 3.121 The Committee agrees that MLAs that have engaged or are engaged in corrupt conduct or misconduct should be subject to investigation by the ICAC. However, for the reasons outlined above, the Committee does not consider that less serious matters that fall within ‘unsatisfactory conduct’, should fall within the ICAC’s remit. The Committee agrees with Mr Walker SC that clause 12(3) should be extended to include Members of the Legislative Assembly.

¹³⁰ Ms Caroline Heske, Committee Transcript, 9 October 2017, p.36

¹³¹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.9

¹³² *Crime and Corruption Act 2001* (QLD), s6; *Independent Commission Against Corruption Act 1988* (NSW), s122; *Integrity Commission Act 2009* (TAS), s100

Recommendation 10

The Committee recommends that clause 12(3) be amended to read as follows:

Despite subsection (1), unsatisfactory conduct does not include any conduct engaged in by a judicial officer in the performance of judicial functions, or by a Member of the Legislative Assembly.

Protected Communications

3.122 Mr Alan MacSporran QC noted that, in contrast to the Queensland legislation, the Bill does not appear to incorporate a “statutory right for any person to make protected complaints of improper conduct directly to the ICAC or public bodies and public officers.”¹³³ On the other hand, the Hon Bruce Lander QC queried whether the extent of the protection provided for in the Bill is, in fact, too wide noting that:

members of the public who make a report of the kind mentioned in clause 92(2) would be providing protected communications and would therefore be persons who have taken protected action ... It is difficult to see how a member of the public would suffer discrimination or victimisation as a consequence of making a report to ICAC (NT). The *Public Interest Disclosure Act 2016* in South Australia limits whistleblower status to public officers except in circumstances where a report is made about environmental or health information.¹³⁴

3.123 With regards to Mr MacSporran’s comment, the Department pointed out that clause 98 provides that a person who reports improper conduct to the ICAC incurs no civil or criminal liability and is protected from disciplinary action, defamation proceedings or any claim of breach of confidentiality which “creates a similar right to that provided by sections 36 and 343 of the Queensland legislation.”¹³⁵ Furthermore, the Department noted that “technical mis-steps by the whistleblower can be cured using clause 93”¹³⁶ which allows for individuals to apply to the ICAC for a declaration that an action that involves an allegation of improper conduct is a protected communication.

3.124 During the hearing Mr Lander clarified his comments regarding the inclusion of members of the public in the definition of whistleblowers noting that:

ordinarily, a member of the public is not a whistleblower as such. A whistleblower is someone who has information within their remit, as a result of their employment, and who then wishes to provide that information for the purposes of having the matter addressed, and does so at a risk to that person.

Members of the public are not those types of persons. Members of the public may be victims but they are not whistleblowers as such ... Members of the

¹³³ Crime and Corruption Commission QLD, Submission No. 7, p.2

¹³⁴ Independent Commissioner Against Corruption SA, Submission No. 8, p.7

¹³⁵ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.36

¹³⁶ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.36

public sector bring it to the attention for the altruistic purpose of having the matter addressed, rather than as victims.¹³⁷

3.125 Nevertheless, the Committee notes that in a jurisdiction the size of the Northern Territory, there would be a significantly higher likelihood that a member of the public could find themselves the subject of discrimination or victimisation as a result of making a complaint to the ICAC than might be the case in a jurisdiction the size of South Australia.

3.126 Mr Lander also queried whether it was appropriate to empower the ICAC to make declarations of protected action noting that:

a declaration of the kind that is envisaged in clause 93 would ordinarily be made by a court rather than by an administrative decision maker which the ICAC (NT) is ... For my part I think the power that is given to the ICAC (NT) in clause 93 ought to be reserved for the courts.¹³⁸

3.127 Noting that the purpose of clause 93 is to confer protection on a discloser going forward rather than a determination of past rights, the Department advised that clause 93 is essentially:

a procedural safeguard to cure a technical irregularity, and hence an appropriate matter for the ICAC to determine ... Given the limited and prospective nature of clause 93's operation ... there is no need to require the additional safeguard of a court decision ... 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 a greater risk of retaliation by revealing their identity and the full nature of their comments;
- 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.¹³⁹

Committee's Comments

3.128 The Committee considers that Part 6 of the Bill incorporates a comprehensive whistleblower protection scheme which, as noted by the Commissioner for Public Interest Disclosures, significantly enhances existing provisions.¹⁴⁰

¹³⁷ Hon Bruce Lander QC, Committee Transcript, 9 October 2017, p.14

¹³⁸ Independent Commissioner Against Corruption SA, Submission No. 8, p.7

¹³⁹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p. 37

¹⁴⁰ Ms Brenda Monaghan, Committee Transcript, 9 October 2017, p.29

Offence to Engage in Retaliation in Course of Management

3.129 Clause 100 makes it an offence for a public officer to ‘engage in retaliation’ against a whistleblower who is ‘under their management, supervision or control’. Clause 100(5)(b) provides for a defence where the person charged ‘believed’ that the conduct was ‘a reasonable way’ of carrying out their ‘role and responsibilities as a public officer.’ However, as noted by Professor Aughterson:

by the terms of clause 100(5)(b) the belief is assessed on a purely subjective basis (rather than requiring a ‘reasonable belief’) which might make any offence difficult to prove.¹⁴¹

3.130 The Department advised that the Bill sets a higher standard of proof for the criminal offences of retaliation compared to the provisions for civil action for compensation for retaliation, since it was considered 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 ... 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 mis-step, 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.¹⁴²

3.131 Nevertheless, as pointed out by Ms Brenda Monaghan (Commissioner for Public Interest Disclosures), it remains a fact that while it is:

a criminal offence to bully or sack a whistleblower. That, in practice, acts more as a big stick. The reality of successful prosecutions across numerous jurisdictions in Australia is that it is easier to threaten, it is often harder to actually accomplish. However, being a criminal offence, on the books, with a penalty of two years imprisonment is a very strong deterrent.¹⁴³

Committee’s Comments

3.132 While acknowledging comments regarding the difficulties associated with successfully prosecuting an offence of this nature, the Committee is of the view that on balance the Bill provides an appropriate deterrent against such conduct while ensuring whistleblowers are afforded an appropriate level of protection against retaliation in the workplace.

Misleading Information

3.133 Mr Tony Tapsell (Chief Executive Officer: Local Government Association of the Northern Territory) suggested that the Bill does not go far enough when it comes

¹⁴¹ Professor Ned Aughterson, *Review of the ICAC Bill*, (unpublished) 2 October 2017, p.7

¹⁴² Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, pp.37-8

¹⁴³ Ms Brenda Monaghan, Committee Transcript, 9 October 2017, p.29

to dealing with persons who make false allegations or make allegations as an abuse of process.

The act of making an allegation or disclosure can be built on all kinds of evidence some of which may prove to be groundless during or following investigations. LGANT does not consider at the moment that there is enough recourse going the way of the person aggrieved by such an event and especially given the time and resources an organisation or person has to provide to defend themselves against such disclosures. From this point of view the legislation is ineffective because it is costly and leads to a nil outcome.¹⁴⁴

3.134 Mr Peter Shoyer noted that striking a balance between encouraging people to come forward and make disclosures and guarding against problematic complainants that may make frivolous, vexatious or unfounded allegations is an issue for any broad complaints organisation.

That is something you need to allow the Commissioner discretion to be able to say, "All right, we do not think there is enough in this. We are not going to investigate it." I think the current bill provides for that.¹⁴⁵

3.135 Moreover, as the Department pointed out, research indicates that:

an effective whistleblower scheme does not limit reports based on the whistleblower's motivations, but prohibits only false and misleading information. 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 and encourages all disclosures made in good faith, but excludes protection for information that person knows is false or misleading (including misleading by omission).¹⁴⁶

3.136 Pursuant to clause 91(2), providing information to the ICAC that a person knows or believes to be misleading is not protected. It is an offence under clause 151 for a person to give misleading information to the ICAC, or for a person acting in an official capacity to accept the protected communication where it is known to be misleading. Moreover, the offence carries a maximum penalty of 400 penalty units (\$61,600) or imprisonment for 2 years.

This is consistent with the equivalent provision in section 51 of the *Public Interest Disclosure Act*, and is intended as a strong incentive to require informants, witnesses, and the subjects of allegations to take their obligation to be honest and forthcoming seriously.¹⁴⁷

Committee's Comments

3.137 While satisfied that the Bill includes appropriate provisions for dealing with false or misleading allegations of improper conduct, the Committee notes that ensuring public officers and public bodies clearly understand their obligations in this regard

¹⁴⁴ Local Government Association of the Northern Territory, Submission No. 9, p.1

¹⁴⁵ Mr Peter Shoyer, Committee Transcript, 9 October 2017, pp.28-9

¹⁴⁶ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p. 38

¹⁴⁷ Explanatory Statement, *Independent Commissioner Against Corruption Bill (Serial No. 30)*, 23 August 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.59

will be particularly important in the lead up to the introduction of the ICAC. As noted by Mr Craig Allen:

I think the agencies from the government's side will have to do a bit of work about getting prepared for the ICAC. There will be, as quite rightly pointed out by the Commissioner for Public Interest Disclosures some work around whistleblower protections within agencies because I do not think the agencies are sophisticated in that space at the moment.¹⁴⁸

Appointment of the ICAC

3.138 Clause 112 provides for the appointment of the ICAC, as an independent statutory officer, by the Administrator following a recommendation of the Legislative Assembly. Noting the importance of ensuring that Territorians perceive the ICAC to be an independent body that is not subject to direction from the Government of the day, and the considerable power vested in the ICAC, Committee members were particularly concerned that the Bill does not clarify how the preferred applicant is to be selected.

3.139 The Explanatory Statement does, however, indicate that:

it is anticipated that appointment of the ICAC will follow the same protocol as appointment of a judicial officer, where an appropriately qualified panel considers and puts forward a recommendation of a suitable candidate, which the majority of the Legislative Assembly must then approve. ... The appointee cannot simply be chosen by Cabinet without the assent of the Assembly.¹⁴⁹

3.140 While Commissioner Martin agreed that it was appropriate that an advisory panel such as the Judicial Appointments Panel be required to make recommendations regarding persons suitable for appointment, he did not consider it appropriate that such recommendations be made to the Attorney-General as is the case with judicial appointments noting that:

the importance of the position warrants giving the Assembly a role in the appointment by providing that the appointment be made by the Administrator on the recommendation of a bipartisan Standing Committee.¹⁵⁰

3.141 Consistent with equivalent legislation in other jurisdictions and accepted best practice for appointments of this nature, Recommendation 9 of Commissioner Martin's report therefore proposed that the appointment process include:

- A panel such as the Judicial Appointments Panel making recommendations as to an appointment to a bipartisan Standing Committee of the Assembly.
- The Standing Committee making recommendation to the Administrator.

¹⁴⁸ Mr Craig Allen, Committee Transcript, 9 October 2017, p.28

¹⁴⁹ Explanatory Statement, *Independent Commissioner Against Corruption Bill (Serial No. 30)*, 23 August 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.50

¹⁵⁰ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p.10 and 143-4

- The Standing Committee possessing the power of veto with provision for resolving any deadlock.¹⁵¹

3.142 During the hearing the Department advised the Committee that reference to the *Protocol for Judicial Appointments* was not included in the Bill since it is not legislated and was under review at the time of drafting.¹⁵² While noting that this review has now been completed,¹⁵³ the Committee agrees that it would not be appropriate for it to be included in the Bill. Moreover, the Committee notes that while highlighting the Judicial Appointments Panel as an example of what a suitably constituted advisory panel might look like, as per his subsequent recommendation, Commissioner Martin clearly established that the process for judicial appointments was not entirely appropriate for the appointment of the ICAC.

Committee's Comments

3.143 The Committee is of the view that Clause 112 should be amended to provide for a more robust process of appointment of the ICAC which more accurately reflects Commissioner Martin's recommendation and accepted best practice concerning appointments of this nature elsewhere in Australia.

Recommendation 11

The Committee recommends that clause 112(2) be amended such that the appointment of the ICAC by the Administrator can be made only after:

- (a) **an advisory panel chaired by a former Supreme Court Judge and including the Solicitor-General for the Northern Territory and the Chief Executive Officer of the Department of the Attorney-General and Justice makes a recommendation to the Assembly Committee, or if there is no Assembly Committee the Legislative Assembly; and**
- (b) **the Assembly Committee, or if there is no Assembly Committee the Legislative Assembly, makes a recommendation to the Administrator.**

Appointment of Inspector and Oversight of the ICAC

3.144 Clause 133 creates a statutory role of 'Inspector' appointed by the Administrator to oversight the ICAC and ensure it acts within power. As provided for by clause 134, the Inspector's key functions are to:

- provide the Legislative Assembly with an annual evaluation of the ICAC's performance;

¹⁵¹ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p.10 and 143-4

¹⁵² Ms Caroline Heske, Committee Transcript, 9 October 2017, p.39

¹⁵³ Northern Territory of Australia, *Protocol for judicial appointments and appointment as President or Deputy President of the Northern Territory Civil and Administrative Tribunal*, 27 September 2017, <http://www.supremecourt.nt.gov.au/documents/ReviewoftheProcessesfortheAppointmentofJudicialOfficersintheNorthernTerritory-Report.pdf>

- handle complaints about the ICAC or members of the ICAC staff; and
- make recommendations to the ICAC and other public bodies regarding the performance of functions under the Act.

3.145 Mr John Hyde (Chair, Global Organisation of Parliamentarians Against Corruption), suggested that the Inspector should be an independent officer of the Parliament, reporting to a bipartisan Standing Committee of the Parliament rather than a statutory officer reporting to the ICAC Minister.¹⁵⁴ Based on his experience as a previous Chair of the WA Parliament Joint Standing Committee on the Corruption and Crime Commission, Mr Hyde noted that it proved extremely beneficial for the Inspector to have access to the Committee as a ‘sounding board’ regarding the way the anti-corruption commission was working; especially given the Inspector’s role in making recommendations regarding practices or procedures in relation to the performance of functions under the Act.¹⁵⁵

3.146 Although Commissioner Martin was not convinced that appointment of the Inspector as an officer of the parliament would necessarily afford the position any more independence than that of a statutory officer appointed by the Administrator,¹⁵⁶ he supported the establishment of a bipartisan Standing Committee of the Assembly with appropriate oversight of the ICAC. Noting that a parliamentary committee plays a role in every other jurisdiction, Commissioner Martin pointed out that “details vary, but monitoring and reviewing the operations of the anti-corruption bodies is a common theme.”¹⁵⁷

3.147 Noting that the capacity for the Inspector to make reports on an on-going basis was a strength in both the WA and QLD models, Mr Hyde strongly urged the Committee to consider amending the Bill to explicitly empower the Inspector to make reports as required rather than being limited to the annual evaluation report.¹⁵⁸ Mr Hyde also noted that the WA legislation provides the Inspector the option of reporting through an oversight committee, rather than reporting directly to the Parliament, thereby protecting the Inspector from “being subject to media or public attacks because his work was coming through the committee.”¹⁵⁹

3.148 Since the Inspector is required to receive and deal with complaints about the ICAC or members of the ICAC on an as-needs basis, the Department acknowledged that it might be prudent to explicitly empower the Inspector to:

¹⁵⁴ Global Organisation of Parliamentarians Against Corruption, Submission No. 1, p. 1; Mr John Hyde, Committee Transcript, 9 October 2017, p.23

¹⁵⁵ Global Organisation of Parliamentarians Against Corruption; Committee Transcript, 9 October 2017, p.23

¹⁵⁶ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p.139

¹⁵⁷ Hon BR Martin, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Department of the Chief Minister, Darwin NT, 2016, p.74

¹⁵⁸ Mr John Hyde, Committee Transcript, 9 October 2017, p.23; Global Organisation of Parliamentarians Against Corruption, Submission No. 1, p.1

¹⁵⁹ Mr John Hyde, Committee Transcript, 9 October 2017, p.24

make such reports to the Minister or Legislative Assembly (at the Inspector's discretion) ... when the Inspector forms the view that the annual evaluation would be an insufficient tool to communicate concerns.¹⁶⁰

Committee's Comments

- 3.149 With regards to the appointment of the Inspector, and further to Commissioner Martin's comments, the Committee notes that given clause 134(2) provides that the Inspector is not subject to direction by any person about the way in which they perform their functions, it is satisfied that the Bill provides an appropriate level of independence.
- 3.150 Acknowledging Commissioner Martin's point that parliamentary committees in all other jurisdictions play a role in holding anti-corruption bodies to account, the Committee notes that clause 5 of the Bill provides that the Legislative Assembly may, by resolution, designate a parliamentary committee to receive reports, and perform other functions in relation to the ICAC.
- 3.151 The Committee agrees with Mr Hyde that the Bill should explicitly empower the Inspector to make reports on issues that arise on an as-needs basis. Similarly, the Committee is of the view that providing the Inspector with the option to report to a designated oversight committee or the ICAC Minister depending on the nature of the issue at hand has merit.
- 3.152 While the Committee accepts the Department's proposed amendment in this regard, it is also of the view that, as provided for in clause 136(4) in relation to the Inspector's evaluation reports, where reports are made to the ICAC Minister they should be required to table such additional reports in the Legislative Assembly within 6 sitting days of receipt.

Recommendation 12

The Committee recommends that Clause 136 be amended to:

- (a) empower the Inspector to make general reports to the Minister or the designated oversight Committee when the Inspector is of the view that the annual evaluation would be an insufficient tool to communicate concerns; and**
- (b) require the ICAC Minister to table a copy of any such reports in the Legislative Assembly within 6 sitting days of receipt.**

Repeal and Transitional Matters

- 3.153 As mentioned previously, the ICAC Bill repeals the *Public Interest Disclosure Act*. Ms Brenda Monaghan noted that clause 160 provides for investigations commenced under the *Public Interest Disclosures Act* but not completed before repeal of the Act to be completed by the ICAC.

¹⁶⁰ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, p.38

3.154 However, while clause 160(2) provides for all information relevant to these investigations to be transferred to the ICAC, the Bill does not include any provision for the transfer of “completed investigation files and other records created by the PID Office since it commenced operation.”¹⁶¹

3.155 As noted by the Commissioner, since current staff of the Public Interest Disclosures Commission will be relocated to the ICAC Office and the ICAC will be responsible for finalising any outstanding investigations, it is suggested that “it is appropriate for all PID records to be held by the ICAC Commissioner.”¹⁶²

Committee’s Comments

3.156 The Committee agrees with the Commissioner that the Bill should incorporate a provision for the transfer of all files, both past and current, from the Public Interest Disclosures Commission to the ICAC.

Recommendation 13

The Committee recommends that clause 160 be amended to include a provision for the transfer of all records from the Office of the Commissioner for Public Interest Disclosures to the ICAC.

Typographical Errors

3.157 As highlighted in the Department’s advice, there is a typographical error in the section reference at clause 129(1)(f) which should read ‘section 105’ rather than ‘section 0’. It is also noted that the numbering of subsequent clauses (1)(f) to (1)(i) needs to be amended to remove duplication of a clause (1)(f).¹⁶³

Committee’s Comments

3.158 The Committee acknowledges the Department’s advice and the need to make the suggested correction.

Recommendation 14

The Committee recommends that the reference to section 0 in clause 129(1)(f) be amended to section 105 and that the numbering of subsequent clauses be corrected to remove duplication of a clause (1)(f).

¹⁶¹ Commissioner for Information and Public Interest Disclosures, Submission No. 12, p.1

¹⁶² Commissioner for Information and Public Interest Disclosures, Submission No. 12, p.1

¹⁶³ Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>, pp.2-3

4 Schedule of Proposed Amendments

CLAUSE 12

A1.R2 Clause 12(1)(a)(i)

omit

illegality or

A2.R10 Clause 12(3), after “judicial functions”

insert

, or by a Member of the Legislative Assembly

CLAUSE 18

A3.R3 Clauses 18(1)(c)(iv), 18(3)(b) and 18(4)

omit

another entity

insert

referral entity

NEW CLAUSE 22(6)

A4.R4 After Clause 22(5)(b)

insert

(6) This subsection is declared to be a Corporations legislation displacement provision for the purposes of the *Corporations Act 2001* (Cth), section 5G, in relation to section 1317AE of that Act.

Notes for subsection (6)

1. *The Corporations Act, section 5G, provides that if a Territory law declares a provision of a Territory law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the Territory provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.*
2. *It is intended that this subsection is only to commence following receipt of the required agreement by the Commonwealth, States and the ACT.*

CLAUSE 34

A5.R5 After Clause 34(2)(c)

Insert

Note for subsection 34(2)

Section 41A requires that a notice to attend a public inquiry advise a witness of their rights under subsections 41A(1), 80(3) and 80(4).

NEW CLAUSE 41A

A6.R5 After Clause 41

insert

41A Rights of Witnesses

- (1) A witness may make application, before or during an open session, for a direction under section 46.
- (2) The ICAC must invite a witness to give reasons for an application under subsection (1).
- (3) The ICAC must hear submissions about the applicability of subsection (1) in a closed session if the witness requests.
- (4) The ICAC must advise a witness in a notice given under section 41 and at an open session prior to the witness giving evidence of their rights under subsection (1) and subsections 80(3) and 80(4).

CLAUSE 49

A7.R6 Clause 49(1)

omit

Note for subsection (1)

An investigation report may contain recommendations – see section 55.

NEW CLAUSES 49(2A) and 49(2B)

A8.R6 After Clause 49(2)

Insert

- (2A) An investigation report may:
- (a) contain as much information as the ICAC considers appropriate in relation to the subject matter of the investigation to which the inquiry relates; and
 - (b) include a finding as to whether a person has engaged in, is engaging or is about to engage in, improper conduct; and
 - (c) include information as to whether an allegation of improper conduct has been referred to, or in the ICAC's opinion warrants referral to, a referral entity.

Note for subsection (2A)

An investigation report may contain recommendations – see section 55.

- (2B) However, an investigation report must not include a finding:

- (a) as to whether a person has committed, is committing or is about to commit, and offence or a breach of discipline; or
- (b) as to the prospects of success of any current or future prosecution or disciplinary action.

CLAUSES 67 and 68

A9.R7 Clauses 67(1), 67(3), 68(1), 68(2), 68(3)(b), 68(3)(c), 68(4), 68(4)(a), 68(5)

omit

justice of the peace

insert

judicial officer

CLAUSE 80

A10.R8 Clause 80(2), after “with”

omit

, or facing criminal proceedings for,

CLAUSE 112

A11.R11 Clause 112(2), after “of”

insert

the Assembly Committee, or if there is no Assembly Committee,

A12.R11 Clause 112(3)

omit/insert

- (3) The Minister may appoint an advisory panel to provide a written recommendation identifying a person for appointment as the ICAC to the Assembly Committee, or if there is no Assembly Committee, to the Legislative Assembly.

NEW CLAUSES 112(4), 112(5) and 112(6)

A13.R11 After clause 112(3)

Insert

- (4) The advisory panel must consist of:
 - (a) a chairperson who must be a former Judge of the Supreme Court of a State or Territory or the Federal Court, who has not been retired for more than seven years;
 - (b) the Solicitor-General for the Northern Territory; and
 - (c) the Chief Executive Officer of the Department of the Attorney-General and Justice.

- (5) The Assembly Committee, or if there is no Assembly committee, the Legislative Assembly, may only recommend a person for appointment as the ICAC if that person has been recommended by an advisory panel appointed under subsection (3).
- (6) The ICAC Minister must table a copy of the appointment in the Legislative assembly within 6 sitting days after the appointment is made.

CLAUSE 129

A14.R14 Clause 129(1)(f), after “section”

omit

0;

insert

105;

A15.R14 Clauses 129(1)(f) to 129(1)(i)

omit (second instance of)

(f)

insert

(g) [and renumber remaining clauses (g) to (i) accordingly]

NEW CLAUSE 136A

A16.R12 After Clause 136(4)

insert

136A General Reports

The Inspector may, at any time, make a report (*a general report*) on any matters the Inspector considers relevant:

- (a) to the ICAC Minister, or the Assembly Committee, when the Inspector considers that the annual evaluation report would not be sufficiently timely; and
- (b) the ICAC Minister must table a copy of a report that the Minister receives under this section in the Legislative Assembly within 6 sitting days after the Minister receives the report.

NEW CLAUSE 160A

A17.R13 After Clause 160(4)(b)

insert

160A Completed Investigations and Other Records

The following information in the possession or control of the PID Commissioner immediately before the commencement is to be transferred to the ICAC:

- (a) any information relating to a disclosure or purported disclosure under section 10 of the repealed Act, whether or not the information relates to a current investigation, including but not limited to information related to preliminary enquiries, informal or formal referrals, investigations or reports; and
- (b) any information which may disclose the identity of a discloser or purported discloser, or which relate to dealing with a discloser or purported discloser in any way; and
- (c) any legal advice or information that relates to actual or potential legal proceedings; and
- (d) any confidential information obtained from a law enforcement agency.

SCHEDULE 1

A18.R3 Clause 4(g), after “to”

omit

another entity

insert

referral entity

Appendix A: Submissions Received and Public Hearings

Submissions Received

1. Global Organisation of Parliamentarians Against Corruption – Oceania Region
2. Ombudsman NT, NT Commissioner for Public Employment, NT Commissioner for Public Interest Disclosures
3. Hon Kezia Purick MLA, Speaker – Legislative Assembly of the Northern Territory
4. Public Health Association of Australia
5. East Arnhem Regional Council
6. Mr Scott Beaton
7. Crime and Corruption Commission Queensland
8. Independent Commissioner Against Corruption South Australia
9. Local Government Association of the Northern Territory
10. Confidential Submission
11. Integrity Commission Tasmania
12. Commissioner, Information and Public Interest Disclosures

Public Hearing - *Darwin: Monday, 9 October 2017*

- Mr Scott Beaton – NT Resident
- Mr Alan MacSporran QC: Chair, Crime and Corruption Commission Queensland
- Hon. Bruce Lander QC: Independent Commissioner Against Corruption South Australia
- Mr Richard Bingham: Chief Executive Officer, Integrity Commission Tasmania
- Mr John Hyde: Chair, Global Organisation of Parliamentarians Against Corruption – Oceania Region
- Mr Peter Shoyer: Ombudsman NT
Mr Craig Allen: Commissioner for Public Employment
Ms Brenda Monaghan: Commissioner for Public Interest Disclosures
- Mr Greg Shanahan: Chief Executive Officer, Department of Attorney-General and Justice
Mr Robert Bradshaw: Director, Policy and Coordination, Department of Attorney-General and Justice
Ms Caroline Heske: Senior Policy Lawyer Department of Attorney-General and Justice.

Note: Copies of submissions, hearing transcripts and tabled papers are available at: <https://parliament.nt.gov.au/committees/spsc/ICAC>

Bibliography

Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, 2011,

<https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

Aughterson, N., *Review of the ICAC Bill*, (unpublished), 2 October 2017

Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Commonwealth of Australia, Sydney NSW, December 2015

Commonwealth of Australia Constitution Act

Corruption, Crime and Misconduct Act 2003 (WA)

Crime and Corruption Act 2001 (QLD)

Crime Commission Act 2012 (NSW)

Department of the Attorney General, *Handbook for Justices of the Peace*, Government of Western Australia, Perth WA, 2017

Department of the Attorney-General and Justice, *ICAC Bill compared to the Recommendations of the Martin Report*, Northern Territory Government, Darwin NT, June 2017, <https://justice.nt.gov.au/attorney-general-and-justice/law/icac-bill>

Department of the Attorney-General and Justice, *Independent Commissioner Against Corruption – Frequently Asked Questions*, Northern Territory Government, Darwin NT, June 2017, <https://justice.nt.gov.au/attorney-general-and-justice/law/icac-bill>

Department of the Attorney-General and Justice, *Answers to Written Questions*, 9 October 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>

Department of Justice and the Attorney-General, *Handbook: Duties of Justices of the Peace (Qualified)*, the State of Queensland (Department of the Premier and Cabinet), Brisbane QLD, 2017

Explanatory Statement, *Independent Commissioner Against Corruption Bill (Serial No. 30)*, 23 August 2017, <https://parliament.nt.gov.au/committees/spsc/ICAC>

Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill (Serial 35)*, <https://parliament.nt.gov.au/committees/spsc/CRA>

Fyles, Hon N, *Restoring Trust in Government – An NT ICAC*, Media Release, Northern Territory Government Newsroom, Darwin NT, 28 June 2017, <http://newsroom.nt.gov.au/mediaRelease/23349>

Independent Broad-Based Anti-Corruption Commission Act 2011 (VIC)

Independent Commission Against Corruption Act 1988 (NSW)

Independent Commissioner Against Corruption Act 2012 (SA)

Inquiries Act 2016 (NT)

Integrity Commission Act 2009 (TAS)

International Covenant on Civil and Political Rights, 23 March 1976, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>

Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act 2008 (NT)

Legislative Assembly (Powers and Privileges) ACT 2011 (NT)

Legislative Assembly of the Northern Territory, *Standing Orders*, In force as of 21 April 2016, <https://parliament.nt.gov.au/business/standing-and-sessional-orders>

Legislative Standards Act 1992 (QLD)

Martin, Hon BR, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016*, Darwin NT, Department of the Chief Minister, 2016

Northern Territory of Australia, *Protocol for judicial appointments and appointment as President or Deputy President of the Northern Territory Civil and Administrative Tribunal*, 27 September 2017, <http://www.supremecourt.nt.gov.au/documents/ReviewoftheProcessesfortheAppointmentofJudicialOfficersintheNorthernTerritory-Report.pdf>

Northern Territory (Self-Government) Act 1978 (Cth)

Office of the Queensland Parliamentary Counsel, *Principles of Good Legislation: OQPC Guide to FLPS – Self-incrimination*, Office of the Queensland Parliamentary Counsel, Brisbane Qld, June 2013

Parliamentary Privileges Act 1987 (Cth)

Parliamentary Record, (Hansard) and Minutes of Proceedings, 12th Assembly, Full Text Transcripts, 26/08/2015, Parliamentary Record No. 22. https://parliament.nt.gov.au/business/hansard/transcripts/listing/nest_content?target_id=346509&parent_id=358614

Parliamentary Record, (Hansard) and Minutes of Proceedings, 12th Assembly, Full Text Transcripts, 27/06/2016, Parliamentary Record No. 30. https://parliament.nt.gov.au/business/hansard/transcripts/listing/nest_content?target_id=362094&parent_id=358614

Parliamentary Record, (Hansard) and Minutes of Proceedings, 13th Assembly, Debates, 23/08/2017, p.1, https://parliament.nt.gov.au/data/assets/pdf_file/0019/443341/FINAL-DEBATES-DAY-5-23-AUGUST-2017.pdf

Parliamentary Record, (Hansard) and Minutes of Proceedings, 13th Assembly, Debates, 24/08/2017, p.70, https://parliament.nt.gov.au/data/assets/pdf_file/0003/443568/DEBATES-DAY-6-24-AUGUST-2017.pdf

Police Administration Act 2017 (NT)

Rogers, D, *Coercion in Crime Commissions and the Abrogation of the Privilege Against Self-Incrimination*, 2012, <http://www.robertsonogorman.com.au/media/2053/Coercion-in-Crime-Commissions-and-the-Abrogation-of-the-Privilege-against-Self-incrimination.pdf>

Surveillance Devices Act 2017 (NT)