

Mr John Lawrence SC
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PRIVILEGED & CONFIDENTIAL

URGENT

23 June 2021

The Honourable Michael Gunner MLA
Chief Minister
Legislative Assembly of the Northern Territory
Parliament House
Darwin NT 0800

Via email: Michael.Gunner@nt.gov.au; Chief.Minister@nt.gov.au

Dear Chief Minister,

Urgent Request To Submit Evidence to the Estimates Committee

I have been engaged as Counsel by Mr. Bill Doogue of Doogue & George, Solicitors of Melbourne, to represent his client (hereafter referred to as “**B**” and with the gender-neutral pronoun “**they**”) who is a “**protected person**” under the *Independent Commissioner Against Corruption Act 2017* (NT). I write to you on an urgent basis pursuant to the Legislative Assembly of the Northern Territory’s Standing Order 210(14)-(15) which state:

Procedures to be followed by Assembly Committees for the Protection of Witnesses

Unless otherwise ordered the following procedures will be followed by Committees of the Assembly when dealing with witnesses and prospective witnesses:

...

(14) where a witness gives evidence reflecting adversely on a person and the Committee is not satisfied that that evidence is relevant to the Committee’s inquiry, the Committee will give consideration to expunging that evidence from the transcript of evidence, and to forbidding the publication of that evidence.

(15) where evidence is given which reflects adversely on a person and action of the kind referred to in paragraph (14) is not taken in respect of the evidence, the Committee will provide reasonable opportunity for that person to have access to that evidence **and to respond to that evidence by written submission and appearance before the Committee.** [writer’s emphasis]

...

On Tuesday 15 June 2021, the NT Independent Commissioner Against Corruption, Mr. Ken Fleming QC, gave evidence during a hearing of the Northern Territory Estimates Committee. The following aspects of his evidence, published and reported (much of which was false) “reflected adversely” on **B** and so by law, and in fairness, **B** requests the opportunity to respond through this submission and by representative appearance before the Estimates Committee.

Mr. Fleming’s offending remarks occurred during his answer to a question from Ms. Finocchiaro concerning a conflict of interest. Mr. Fleming had just inadequately explained the conflict of interest issue which had been reported in the media relating to Ms. Kelly, the ICAC Senior Investigative Officer, and ICAC’s hiring of her partner, Mr. McGinlay, as a consultant. He then chose to make the following remarks.

From pages 24-25 of the Transcript:

...

Mr FLEMING: There was some jealousy in the office, some people were saying that they were not getting the investigation work and the material from the paper I can assure you has come out of our office contrary to the *ICAC Act*, contrary to the *Oaths Act* and I intend to follow it up.

In addition to that, the person who gave that material over has Northern Territory Government material and objects, for example, lap top computer, a mobile phone and a card which we have requested from her three times and has not been returned. I intend to turn that matter over to the police this week.

The person who released that information was in fact in the second period of probation. Her probation was extended from six months because she was not satisfying the requirements of a senior investigator. She complains about such things as preparing documents, notices under section 34 and section 32 of the act, and section 147 of the act, and considers them to be menial. I do not. I consider them to be at the very heart of what we do when if they are not right we have no entitlement to bring somebody in.

That was the sort of material about which she complained. We gave her a notice that we intended to terminate her employment whilst still under probation at about the tenth month of her probation. She immediately made what she considered to be a protected communication to me. She then made a complaint, as she is entitled to do, to the inspector, she has then made a complaint to the Commissioner for Public Employment seeking to overturn our decision to give her notice of termination.

The Commissioner for Public Employment took a little longer than normal to make her decision because she was inundated with the the 50-odd pages, plus the 200-something pages that go with that. After about three weeks, she confirmed our decision that she be terminated. That is where the material has come from. I know that because I was sent a series of questions by the author of the article and they exactly matched the material given to me by that person.

I am concerned there will not be proper coverage of this because I am limited in what I can say, however I intend to pursue it. I should add that section 127A of the Uniform Evidence Act does not apply to a journalist in hearings before me as the ICAC. I am not a judicial entity. Section

127A gives privilege to a journalist in respect to a source if they appear in front of a judicial entity. I am not so defined. I know that is a long answer.

Mrs FINOCCHIARO: That was not where I thought that would go. I will not get in to whether or not the person who gave that information is a whistleblower or any of those other things. They are not matters for me, but I did want to go back to asking about the contracts.

...

B's Employment With ICAC

My client, **B**, commenced employment as a full-time Senior Investigator, subject to a six-month probationary period, on **25 May 2020**. In November 2020 their probationary period was extended for a further six months, thus taking it to **25 May 2021**.

Appalled by the ethical standards generally within ICAC, and in particular what appeared a gross conflict of interest relating to Mr McGinlay's appointment, **B** made a formal Report on **17 March 2021**, pursuant to s 22 of the ICAC Act, outlining their concerns as to the conflict of interest issue and its inadequate management within ICAC and other inadequacies of management, including bullying, within ICAC.

Receipt of that Report was acknowledged by Mr. Fleming in a letter to **B** dated **29 March 2021** (refer: Attachment **A** to this submission). Significantly, Mr. Fleming's letter included:

your report is a '**protected communication**' and you are a '**protected person**'. Anyone who retaliates against a protected person commits an offence under the Act. [refer: Attachment **A** to this Submission]

Supplementing that Report to Mr. Fleming, **B** also directly reported the same concerns to the Inspector of ICAC, Mr. Bruce McClintock QC, of the Sydney Bar, on **1 April 2021**.

On **13 April 2021**, Mr. Fleming sent **B** a Notice of Intention to Terminate Employment during probation (refer: Attachment **B** to this submission). On **24 May 2021**, Mr. Fleming sent **B** a Termination of Employment. This Notice terminated **B**'s employment effective from its date, being **24 May 2021**. In the last paragraph of that Notice, it stated the following:

Ms. Lade, Manager Investigations, will be contacting you to arrange the return of OICAC properties in accordance with the cessation procedures. [refer: Attachment **C**]

On **26 May 2021**, **B** responded to the termination notice and in particular the request for said properties (refer: Attachment **D**). All of that letter is relevant, particularly so at page 2.1:

It appears to be inappropriate that I relinquish possession of these items to the very subject of the investigation. I do not imagine it was your intention for evidence regarding the subject of your investigation to be handed to said subject. It is appropriate in these circumstances that the Inspector (meaning Mr. McClintock) take direct receipt of these electronic devices, **if indeed the Inspector is actually dealing with this matter**. [writer's emphasis]

B's query on whether the Inspector was dealing with their Report was made because, up until today's date, the Inspector has still not taken any statement or sought any evidence or material from **B** since their Report was made to him on **6 April 2021**. **B** is of the reasonable view that nothing has been actioned by the Inspector of ICAC, even to this date. This is a highly unsatisfactory state of affairs and poses a question over the efficacy of the ICAC Inspector.

In view of all the above, it can be clearly seen that Mr. Fleming's comments have "reflected adversely" on **B** in the following way. Mr. Fleming's decision to gender-specify **B** plus reveal their probationary status and their termination have effectively identified them. Mr. Fleming's evidence that **B** was terminated before then making their Report is totally inaccurate and consequently defamatory. His further comments concerning office jealousy and **B**'s failure to return property which will be the subject of a report by him to the police are likewise disparaging, defamatory and offensive. These comments also happen to be unlawful in that Mr. Fleming has revealed the identity of a **protected person**, referred to a **protected communication** and is doing so in an action of **retaliation** (refer: Part 6, Divisions 1 and 2; ss 101-102 and 145-146 of the *ICAC Act*). Also of relevance is s 21(e) of the *Legislative Assembly (Powers and Privileges) Act 1992* which states:

21 Offences by witnesses

A person who is served with a summons issued under section 18 shall not:

...

(e) give false evidence or make a statement which is false or untrue in a particular

My client, as a matter of fairness and natural justice, seeks the following remedies, pursuant to Standing Order 210(14): that the Committee expunge all of the evidence referred to by Mr. Fleming in this Submission. Further, pursuant to Standing Order 210(15), **B** seeks to appear before the same Committee to set the record straight. Unfortunately, as a consequence of the treatment **B** has been subjected to, they are in the hands of a doctor and a psychiatrist who have indicated that **B** would be in no position to fairly represent themselves in this capacity. Further, **B** is a "protected person" and despite any *in camera* provisions it would be inappropriate for them to appear in person. As a consequence, **B** requests of the Committee that the author of this submission be allowed to present **B**'s response to the stated adverse comments made by Mr. Fleming.

Yours faithfully,

John B. Lawrence SC
Barrister

Cc:

Mr Joel Bowden MLA
Chair
Parliamentary Estimates Committee
Legislative Assembly of the Northern Territory
Parliament House
Darwin NT 0800
Estimates.LA@nt.gov.au; Joel.Bowden@nt.gov.au

Mr Russell Keith
First Clerk Assistant
Standing Committee on the Independent Commissioner Against Corruption
LA.Committees@nt.gov.au

Ms Natasha Fyles MLA
Chair
Committee of Privileges
Standing Committee on the Independent Commissioner Against Corruption
Minister.Fyles@nt.gov.au

Mr Michael Tatham
Clerk
Legislative Assembly
Michael.Tatham@nt.gov.au

**Office of the Independent
Commissioner Against Corruption (NT)**
Level 7, 9 Cavenagh Street
DARWIN CITY NT 0800

2021-142

[REDACTED]

Postal address
GPO Box 3750
DARWIN NT 0801

E Kenneth.fleming@icac.nt.gov.au

Per email: [REDACTED]

Dear [REDACTED]

Re: Your report number 2021-142

I refer to your report received on 17/03/2021 about, *inter alia*, the inadequate management of a conflict of interest, and inappropriate management and treatment of staff by an officer of the Independent Commissioner Against Corruption.

The ICAC's role is to identify, respond and investigate improper conduct and protect persons who have assisted the reporting or addressing improper conduct. The ICAC also has a role in preventing improper conduct from occurring through audits, advice and recommendations.

Your matter is being investigated and the information you have provided with your report has been provided to this investigator. To ensure confidentiality of your report, and reduce the risk of retaliation, the investigator is external to the Office of the ICAC and is required to comply with strict confidentiality. For more information please refer to our 'Your privacy and protection' factsheet available on our website www.icac.nt.gov.au.

Please find attached important information on whistleblower protections. Your report is a "protected communication" and you are a "protected person". Anyone who retaliates against a protected person commits an offence under the Act.

It is important that you report any actual or possible retaliation to the ICAC immediately. That is your responsibility under the Act. In addition, you should seek assistance from support services as soon as possible.

For legal reasons, you will not know the full details of the subsequent investigations or proceedings, but you are entitled to contact the ICAC for a general outline of action that has been undertaken as a result of the facts you have reported.

Yours sincerely



Kenneth Fleming QC.
Independent Commissioner Against Corruption
29 March 2021

**Office of the Independent
Commissioner Against Corruption (NT)**
Level 7, 9 Cavenagh Street
DARWIN CITY NT 0800

Postal address
GPO Box 3750
DARWIN NT 0801

T 08 8999 4015
E Kenneth.Fleming@icac.nt.gov.au

File ref: ICAC-CS-000329

Dear Ms [REDACTED]

Re: Notice of Intention to terminate employment during probation

I am writing to you in relation to your employment as a Senior Investigator at the Administrative Officer level 7 (AO7) designation with the Office of the Independent Commissioners Against Corruption (OICAC), and specifically your probation. The purpose of the probationary period is to formally assess an employee's ability to perform his or her assigned duties, and suitability to perform, or capability of efficiently performing, his or her assigned duties.

I understand that your manager, Ms Kate Kelly Director of Investigations, advised you, on or before 25 November 2020, that your probation was going to be extended by six months. However if that notification did not satisfy the requirements of section 32(3)(c) of the *Public Sector Employment and Management Act 1993* (the Act), your probation was, in any event, extended by section 32(7)(a) of the Act which provides that:

(7) If, at the end of an employee's period of probation, the Chief Executive Officer does not take action as mentioned in subsection (3):

(a) for an employee whose period of probation has not previously been extended – the employee's period of probation is extended for the maximum period for which it could have been extended under subsection (3)(c);

Formal and informal feedback has been provided to you by Ms Kelly and other staff members who managed you throughout this process including the completion of a formal Professional Development Plan (PDP) which all OICAC staff are required to complete. You completed this process in November 2020.

Termination of employment during the probation period can occur at any time in accordance with section 32(5) of the Act. The principles of natural justice must be observed in accordance with Employment Instruction Number 3, which is available from the OCPE website. In accordance with the Commissioner of Public Employment's guidelines on probation, the termination process, including the employee's response, must occur within the period of probation. Your probationary period ends on 25 May 2021.

I have been provided with a draft probation report (**Attachment A**) which includes the reasons provided by your manager, Ms Kelly for recommending that your probationary employment should be terminated. I have also been provided with other relevant documentation regarding this probation process, including your 3rd and 6th month probation reports, and your responses to those reports. A number of concerns regarding your performance have been raised, including your skills and ability to meet the key duties and responsibilities in your job description.

In light of the evidence provided to me, I am of the opinion that your performance does not meet the requirements of the position that you were recruited to. I therefore concur with Ms Kelly, and am of the opinion that your employment should be terminated. I advise that it is my intention to take that action under Section 32(5)(b) of the Act.

However, before I take any action, I invite you to make a submission in writing and provide a response as to the reason(s) why I should not terminate your probationary employment. I request that your written response reach me on or before Monday, **19 April 2021**.

If, after considering your submissions, I still intend to terminate your probationary employment, you will be provided with a written notification and a period of fourteen (14) days in which to seek a review from the Commissioner for Public Employment, pursuant to section 59(1)(a) of the Act, before I take the foreshadowed action (per section 32(6) of the Act).

I remind you that you may access the Employee Assistance Program (EAP) through one of the Northern Territory Public Service providers and I encourage you to take advantage of this service, if needed. The following link will direct you to the Northern Territory Government central internet where you can obtain a list of the providers <https://ntgcentral.nt.gov.au/services-and-support/managing-people-positions/support-and-counselling>.

Should you have any queries regarding this matter, please do not hesitate to contact Ms Kathryn Clet, Business Manager on 8999 4016 or email Kathryn.Clet@icac.nt.gov.au or Ms Shakira Campbell, HR Project Officer on 8999 4043 or email Shakira.Campbell@icac.nt.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'KFleming', followed by a large, stylized flourish.

Kenneth Fleming QC
Independent Commissioner Against Corruption

13 April 2021

**Office of the Independent
Commissioner Against Corruption (NT)**
Level 7, 9 Cavenagh Street
DARWIN CITY NT 0800

Postal address
GPO Box 3750
DARWIN NT 0801

T 08 8999 4015
E Kenneth.Fleming@icac.nt.gov.au

File ref: ICAC-CS-000378

Via email: [REDACTED]
Cc: [REDACTED]

Dear Ms [REDACTED]

Re: Termination of employment during extended probationary period

I write to you in relation to the correspondence that I provided to you on 13 April 2021 (refer **Attachment A**), advising of my intention to terminate your employment under section 32(5)(b) of the *Public Sector Employment and Management Act 1993* (the Act). In that letter, I invited you to make a submission, on or before Monday, 19 April 2021 as to the reason(s) why I should not terminate your probationary employment.

The letter further advised that you could seek a review from the Office of the Commissioner for Public Employment (OCPE), pursuant to sections 32(6) and 59(1)(a) of the Act, if I still intended to terminate your probationary employment after considering your submissions to my letter dated 13 April 2021. I have been informed that you have sought that review on 27 April 2021, and provided numerous materials to OCPE. On 30 April 2020, OCPE provided me with the materials you submitted to them to take into consideration as part of this probation process. I have taken into consideration the materials provided to OCPE in making a decision whether to terminate your employment.

You legal representative, Mr Michael Grove, wrote to me on two occasions seeking additional information in response to my 13 April 2021 letter and further requested an extension to the response deadline, until 3 May 2021. In my correspondence to Mr Grove, additional information was provided and two extensions were granted. The final extension date for your response being 30 April 2021 (refer **Attachment B**).

My office did not receive any response from you by 30 April 2021. I further asked Ms Shakira Campbell, Acting Human Resources Project Officer, to remind you of your opportunity to respond as to why I should not terminate your employment. I asked that that response be provided by 3 pm on Friday 14 May 2021. Mr Grove wrote to me on 14 May 2021, advising that particulars were not provided to your satisfaction. I therefore assume that, as no response was provided to me, that you do not wish to make a formal response.

On 21 May 2021, I was advised by the Commissioner for Public Employment, Ms Vicki Telfer, that she has considered your request for review under section 59 of the Act and she confirmed my intended action to terminate your employment during your extended probation period, pursuant to section 32(6)(b) of the Act.

In light of the evidence before me, the confirmation of the Commissioner for Public Employment of my intended action, and taking into consideration all the materials presented to me as part of this process, I have determined that the concerns raised in my letter of 13 April 2021, remain in place. On this basis, I have decided to terminate your probationary employment under section 32(5)(b) of the Act with effect from today's date.

Based on your length of service you will be paid one week's pay in lieu of being given notice of termination, under section 117(2)(b) of the *Fair Work Act 2009* (Cth).

You will continue to receive workers compensation benefits provided in accordance with the advice from the Northern Territory Government's claims manager Gallagher Bassett, until such time as they have

finished conducting their review of your claim. I recognise that proceedings of this nature can be difficult and, as such, I remind you of the Employee Assistance Program. These services are completely confidential and can be accessed through the following providers:

- Darwin Psychology Services (DPS), Phone: 8932 8460
- Darwin Consultant Psychologists (DCP), Phone 8941 5369
- Employee Assistance Service Australia (EASA), Phone 8941 1752
- Industry Health Solutions (IHS), Phone: 8931 2642
- Relationships Australia Northern Territory (RANT), Phone: 8923 1400
- Wisemind Psychologists, Phone: 8981 5392

Should you have any queries regarding this matter, please contact Ms Kathryn Clet, Acting Director Corporate Services on 8999 4016 or via email at Kathryn.Clet@icac.nt.gov.au. Ms Anne Lade, Manager Investigations, will be contacting you to arrange the return of Office of the ICAC properties in accordance with the cessation procedures.

Yours sincerely



Kenneth Fleming QC
Independent Commissioner Against Corruption

24 May 2021

Attachments:

- A) ICAC letter to Ward Keller dated 13 April 2021
- B) ICAC letters to Ward Keller dated 23 and 28 April 2021



Correspondence - 26 May 2021

1 message

[REDACTED]
To: kenneth.fleming@icac.nt.gov.au

26 May 2021 at 14:31

Dear Commissioner,

I attach a response to your correspondence dated 24 May 2021.

Sincerely,

[REDACTED]

 Letter [REDACTED] to ICAC - 26 May 2021.pdf
72K

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Mr Kenneth Fleming QC
Independent Commissioner Against Corruption
Level 7
9 Cavenagh Street
Darwin NT 0800

Via email: Kenneth.Fleming@icac.nt.gov.au

Dear Commissioner,

Your Correspondence - 24 May 2021

Thank you for your letter dated 24 May 2021 advising me of your decision to terminate my employment as a Senior Investigator at the Office of the Independent Commissioner Against Corruption. I acknowledge receipt of your correspondence.

I note your statement that Ms Anne Lade will be in contact with me to organise the return of NT Government Assets, and direction to contact Ms Kathryn Clet (Business Manager) with any queries I may have.

In my possession are the following items:

- 1 x Building Access Card & Fob to O/ICAC Office
- 1 x Apple iPhone
- 1 x NT Government Laptop

It is my intention to return these items to your office in accordance with the NT Government's policies regarding NT Government property. Please have your office provide me with such documents for my reference so that I may ensure I am compliant with the requirements contained within. I have not been provided with any cessation policy or procedure documents that are part of any formal policy or procedure document.

Ms Anne Lade and Ms Kate Kelly are attempting to have these items returned to the possession of your office's investigations unit. At the direction of Ms Kelly, Ms Lade has made attempts to contact me directly to organise arrangements to speak with me in person and has requested that I complete cessation paperwork.

I draw your attention to the fact that these electronic devices in my possession contain a large amount of evidence pertaining to your investigation of [REDACTED] workplace conduct and allegations of improper and corrupt conduct as well as the contents of my protected communication made to you on 17 March 2021 which raise alleged offences under both the *ICAC Act 2017* and *Criminal Code 1983*.

You advised me by letter dated 13 April 2021 that you "have acted promptly to ensure the security of the evidence, it will be for the Inspector to give further direction", and that "this matter has been referred to the Inspector, and will be dealt with in any manner the Inspector sees appropriate".

I am not aware of any direction the Inspector has made in regards to the return of NT Government assets containing evidence relating to the details of my protected communication or the investigation relating to [REDACTED]

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It appears to be inappropriate that I relinquish possession of these items to the control of the very subject of the investigation. I do not imagine it was your intention for evidence regarding the subject of your investigation to be handed to said subject.

It is appropriate in these circumstances that the Inspector take direct receipt of these electronic devices, if indeed the Inspector is actually dealing with this matter.

As you are intimately aware, I have suffered a workplace injury. Given the nature of the injury, Ms Lade's attempts to contact me directly are entirely inappropriate. I do not intend to have any personal or written contact with any person employed by your office who has had any involvement in the circumstances causing my injury, or who is a complicit party in matters I have reported to you in my protected communication and the Inspector's investigation of [REDACTED]. It is entirely inappropriate to suggest that I have any personal contact with either Ms Lade or Ms Clet in the circumstances.

Please have your office contact me in writing with alternative and suitable arrangements that ensure the security of the evidence contained on the NT Government Assets in my possession.

Sincerely,

[REDACTED]

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The Estimates Committee convened at 1.07 pm.

Mr CHAIR: I open meeting number nine of the Estimates Committee. Welcome, everybody. Agenda item number two is a submission responding to the evidence claimed to adversely reflect on a person. We have Mr John Lawrence here representing person B. We have all received the correspondence and the committee resolved and decided last night, after the hearings, to allow a presentation based on Standing Order 210.

Mr Lawrence, you have the call. Unfortunately, we only have a limited amount of time.

Mr LAWRENCE: I will cut to the chase.

Mr CHAIR: I will just go through this, because we have an *in camera* hearing, which is why we are in here. I will read through this quickly.

Welcome to this private hearing to provide an opportunity to a person to respond to evidence given before the committee that a person claims was reflected adversely on them. It is a formal proceeding of the committee and the protection of parliamentary privilege, and the obligation not to mislead the committee, applies.

I note that as this is an *in camera* hearing, any unauthorised disclosure of this evidence could be a contempt of the Assembly and an offence under section 22 of the *Legislative Assembly Powers and Privileges Act 1992*. A confidential transcript will be made of this hearing—which is why Elise is here—for the use of the committee. I note that while the committee does not, at this point, propose to make the transcript public, Standing Orders require me to advise that it is within the power of the committee to authorise publication of the transcript, but also that the Assembly has the power to order its publication.

I note that time is pressing as the committee needs to adopt and table its report in the Assembly at 2.30 pm, at which time the committee will dissolve, hence why we are meeting in such a rushed manner. The committee is therefore allowed up to 10 minutes for the oral submission today.

Mr Lawrence, could you please state your full name for the record and the capacity in which you are appearing, and then proceed to make your submission to the committee.

Mr LAWRENCE: Before I do that, I want to acknowledge the traditional owners whose land we are gathered on today in the Legislative Assembly precinct, being the Larrakia nation, who have never ceded their sovereignty. I acknowledge their elders, past and present.

My name is John Benjamin Lawrence SC. I appear on the instructions of Mr Bill Doogue, of the Melbourne firm of solicitors Doogue + George, and I represent their client who will be here and after referred to as B, for reasons we all know. I hope I refer to my client as B; if I make a mistake, I apologise to everyone.

As the Chair has already said, I sought leave on B's behalf and it was granted, pursuant to Standing Order 210(15), which states:

... where evidence is given which reflects adversely on a person and action of the kind referred to in paragraph (14) is not taken in respect of the evidence ...

Which is expunging it, and that has not occurred; the evidence is on the transcript:

... the Committee will provide reasonable opportunity for that person to have access to that evidence and to respond to that evidence by written submission and appearance ...

That is my entitlement; I have applied for that. I am grateful and thank you on behalf of B for giving me leave to make submissions on B's behalf now.

Mr CHAIR: Mr Lawrence, do you consider the written submission yesterday as part of that written evidence?

Mr LAWRENCE: Yes, I do, and I rely on it, but before I tender it—if that is the formal verb—I would like to amend it in a couple of things. It is inaccurate in one degree. Could I take the—if members have the letter there? Does anybody have it?

Mr CHAIR: No, I do not have the ...

Mr LAWRENCE: This can be replicated and it will be fixed for the record. I take you to page 3 of the written submission, please. Halfway through there, the sentence beginning with ‘Receipt of that report’—do you have that, Mr Chair?

Mr CHAIR: I have page 3 of 3.

Mr LAWRENCE: That is grand. Receipt of that report was acknowledged by Mr Fleming ...

Mr CHAIR: Yes.

Mr LAWRENCE: ... in a letter to B dated 29 March. Could you please add on to that in brackets, ‘Attachment A’. Thank you. Also, to correct the submission, the following paragraph beginning with ‘Supplementing that report’, I would like leave to—if it is already in evidence—take out the last sentence; it is inaccurate. It reads, ‘Potentially of significance to later in this submission, B received no acknowledgement from the Inspector of receiving this report’. That is not correct.

Mr CHAIR: Remove that line?

Mr LAWRENCE: Yes, please.

Mr CHAIR: I have crossed it out, which we can rectify.

Mr LAWRENCE: While I am at it, go back to ‘6 April 2021’; that is inaccurate as well, forgive me. That should read ‘1 April 2021’. I do not seek to amend it any further, although I can inform you orally that Mr McClintock did acknowledge receipt of it on 4 April. That was why the inaccuracy was there.

On 15 June, which was last week, the Northern Territory ICAC Commissioner, Mr Ken Fleming QC, gave evidence in this honourable committee, and his evidence was broadcast live online. It was also reported, so anybody who was interested could have watched it live. It was reported on the news, in particular Sky, television and others, print media and audio media. It received extensive coverage.

I remind the committee based on this written submission, which is important—I want to correct the record as well as respond to the adverse comments made and the inferences therefrom.

I want to take you through B’s employment record with ICAC. She was employed from 25 May 2020—that is last year—and she was taken on full-time subject to the normal six-month probationary period.

In November of 2020, that probationary period was extended another six months, which took her probationary period up to 25 May this year. Due to concerns that B—who had formerly worked for crime commissions for many years interstate. Due to concerns that B, my client, had on multiple fronts in relation to the running of our ICAC, including what is now public knowledge, a perceived conflict of interest between the senior investigator, Ms Kelly, and her de facto husband, Mr McGinlay, she wrote a formal report to the ICAC Commissioner on—and this is the key—17 March of this year.

On 29 March that report—I am not tendering it because it is over 50 pages plus annexures, but it is not an issue—was acknowledged by the commissioner himself, Mr Fleming. That can be seen in the annexure, which is now described as A. If anyone has that with you—you have—could I ask you to mark that ‘A’, because I inadvertently—someone has changed it. It might have been my clerk. Let me take you to that because it is significant and relevant.

That is an acknowledgement of the 17 March report. If I can take you to the fourth paragraph, Mr Fleming points out, ‘Please find attached important information on whistleblower protections. Your report is a “protected communication” and you are a “protected person”. Anyone who retaliates against a protected person commits an offence under the act.’

I am sure the members of this committee know full well that the part of the ICAC Act, Part 6, on whistleblowers and whistleblower protection, is central; it is the kernel of how ICAC works. Yesterday, ironically—or perhaps coincidentally—on 23 June, was World Whistleblower Day, which is commemorating the courage and assistance that our systems obtain from whistleblowers, and how in a democracy we try to protect them.

On 29 March, B was a whistleblower; she was a protected person who made a protected communication. On 13 April, which is Attachment B, which was a month later, she received from her employer a notice of

intention to terminate. The dates are the important thing here, learned members. That was followed up with Annexure C, which is a letter from Mr Fleming, terminating her employment as of that date, 24 May this year. She was terminated that very day.

I take you to the last paragraph of the termination notice—this is relevant to the commissioner's evidence last week. They say, 'Should you have any queries regarding this matter, contact Kathryn Clet, Acting Director, via email, and Ms Anne Lade, Manager Investigations, will be contacting you to arrange the return of Office of the ICAC properties in accordance with the cessation procedures'. That is, specifically, B's iPhone, her iPad and her access key.

Mr Fleming talked about that in his evidence. He chose to talk about that in his evidence before the Estimates Committee last Tuesday. I will take you to that in a minute. The last annexure is—it is relevant to what I just read out to you—Annexure D, which is B's response to the termination notice, which she made two days later. Do we have that?

Mr CHAIR: Yes.

Mr LAWRENCE: I will not go through it in detail, although I ask you to take it into account in relation to the properties mentioned already. B states, 'It appears to be inappropriate that I relinquish possession of these items to the controller, the very subject of the investigation'. Namely, the investigation that is being undertaken as a consequence of her report from 17 March, which involves personnel in ICAC at top level management. 'I do not imagine it was your intention for evidence regarding the subject of your investigation to be handed to said subject. It is appropriate in these circumstances that the Inspector take direct receipt of these electronic devices, if indeed the Inspector is actually dealing with this matter.'

I want to take you to his evidence, which impacts adversely on B. It is specifically pages 24 and 25 of the transcript, which I copies on for the members. I can take you through that. Hopefully there is one each.

Mr CHAIR: In the interests of time, jump to it.

Mr LAWRENCE: I have given you pages 24 and 25. It is Mr Fleming's evidence, which is answers to a question given by the Leader of the Opposition, who sat on the committee on Tuesday, Mrs Finocchiaro. Her questioning followed up from reports in the *NT News* of that day concerning the perceived conflict of interest issue involving Mr McGinlay.

Mr Fleming answered the question in relation to that, and in the submission I say he inadequately answered that. But it is not for me here, on B's behalf, to go into the proprietary of the conflict of issue—that will be resolved, with any luck, in due course, because it certainly has not been resolved as yet.

Mr Fleming, in his capacity as our independent commissioner, then went on to say this—this is point three; I have highlighted it in yellow. He comes in with the word 'jealousy'. I want to take you through that. By going through it I will show you how he has inaccurately, unfairly—it he was not privileged he would be defaming B. He has also possibly committed criminal offences. That will, no doubt, be pursued by the authorities in due course. He said:

There was some jealousy in the office, some people were saying that they were not getting the investigation work and the material from the paper I can assure you has come out of our office contrary to the ICAC Act, contrary to the Oaths Act and I intend to follow it up.

I say this as an aside, and I am not suggesting that this committee will descend into this territory, but one of the parts of the act that seeks to protect whistleblowers is that it creates an offence of retaliation, and the commission has to warn everybody about that offence. It is a serious offence; it carries two years' imprisonment. I am not asserting that is what is going on here, but let me tell you, on behalf of B, that this whole testimony hurt her greatly, disturbed her greatly, scared her and has really rocked her. She is in the hands of a doctor of medicine and a psychiatrist at the moment, which is why she is unable to give a full account of things here.

Mr CHAIR: Mr Lawrence, because of the time constraints we are in—we have all read the transcript and we were all present. Can we ...

Mr LAWRENCE: I really need to point out ...

Mr CHAIR: Can we cut to the chase, thank you.

Mr LAWRENCE:

The person who released that information—it was in fact in the second period of probation. Her probation was extended from six months because she was not satisfying the requirements of the senior investigator.

There are a couple of things there. Those comments are, per se, hurtful, but they are also potentially identifying B because of her status with the ICAC. It has certainly revealed her identity to everybody in ICAC, and there would be others, by virtue of her probationary status. He also chooses to gender specify B, for a start.

My client instructs me that we do not condescend to answer anything about her going on about not doing menial tasks. We will not even argue with that, other than it is denied.

I want to read this out; this needs to be placed on the record. This committee has to know the accuracy here:

That was the sort of material about which she complained. We gave her a notice that we intended to terminate her employment whilst still under probation at about the tenth month of her probation. She immediately made what she considered to be a protected communication to me.

That statement can be seen to everybody in this room to be false. The order is completely wrong, and him describing to this committee—whether he was on oath or not—what she considered to be a protected commission—you have exhibit A, which is him acknowledging it is a protected communication and she is a protected person.

He has either, being most Christian, made a mistake or he could have lied here. That in itself is an offence and it is pointed out in our submission. I will go on:

The Commissioner for Public Employment took a little longer than normal to make her decision because she was inundated with the 50-odd pages, plus the 200-something pages ... That is where the material has come from; I know that because I was sent a series of questions by the author.

That whole assertion is inaccurate, as I have already explained. I do not think I need to repeat that. It is quite clear in the sequence of the documents ...

Mr CHAIR: I do not think we need to go through it further. I think you have outlined quite clearly, not just with the papers we have, but with your oral submission.

Mr LAWRENCE: Returning to my submission—to complete my oral submissions. I am happy to take any questions if anybody wishes to ask me about this.

Let me place on the record on behalf of B that she is more than happy to return the properties mentioned in these matters. In fact, she is looking forward to giving it to the proper persons, which would be the police. She will give that right up now, if need be. She is looking forward to doing that.

Further, the remedy—first, I got leave and we are grateful for that. I query that this session is *in camera* and is not being held by the public, because the adverse comments made about B were seen and heard by everybody and have been regurgitated for the better part of a week. People would have been sitting in airport lounges watching Sky television—they all know about it. They are not hearing this, which is her countervailing, a justifiable natural justice entitlement. I submit on B's behalf that this session should be made public as a matter of fairness and consistency in complying with subsection (15) of Standing Order 210.

I note what the Chair says, that it can be rectified if the committee feels that or the Legislative Assembly will do that.

Mr CHAIR: Mr Lawrence, in our considerations last night, it was on the basis that B may appear here, and that B may not like to be identified as appearing.

Mr LAWRENCE: Yes. I will respond to that and explain that B's concerns were—she did not even think the *in camera* provisions would be sufficient for B to—that is the only mention of that in the submission, so we are grateful for the concern you are showing for B, but at the same time I think my submission now—I perhaps should have said that at the beginning, but I am sure it can be rectified, because it is being recorded.

Mr CHAIR: Can we jump to the remedy request, if that is okay? We have a full agenda on this meeting and we have to go in to parliament in a short period of time.

Mr LAWRENCE: If the committee is with me on my request on her behalf, that this submission be made public, then we do not seek what the submission said in writing, which was to expunge Mr Fleming's record. We are quite happy for Mr Fleming's record to remain, as long as B's submission, in writing and presented as best I can here in the brief time given, orally—if parliament can consider that on behalf of parliament's constituents so the public, via the media, can get the full picture.

Mr CHAIR: Are there any questions for Mr Lawrence? Thank you Mr Lawrence, we appreciate your time.

The committee concluded.
