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Policy Section
Department of Attorney-General and Justice

via Email: policy.agd@nt.gov.au

Independent Commissioner Against Corruption

City of Darwin supports the introduction of legislation to establish an Independent Commission Against Corruption for the Northern Territory.

City of Darwin's current policy framework recognises the *Public Interest Disclosure Act* and, accordingly, Council will undertake to revise its framework for compliance purposes to meet the requirements of the proposed Act to Establish an Independent Commissioner Against Corruption, to provide for the protection of whistle-blowers, to repeal the *Public Interest Disclosure Act*, and for related purposes.

If you have any further queries please contact Melissa Reiter on (08) 8930 0516 or m.reiter@darwin.nt.gov.au.

Yours sincerely

BRENDAN DOWD
CHIEF EXECUTIVE OFFICER

ATTACHMENT B

Serial
Independent Commissioner Against Corruption Bill 2017
Ms Fyles

A Bill for an Act to establish an Independent Commissioner Against Corruption, to provide for the protection of whistleblowers, to repeal the *Public Interest Disclosure Act*, and for related purposes

CONSULTATION DRAFT ONLY

**PREPARED FOR THE DEPARTMENT OF THE ATTORNEY-GENERAL
AND JUSTICE**

NORTHERN TERRITORY OF AUSTRALIA

INDEPENDENT COMMISSIONER AGAINST CORRUPTION ACT 2017

Act No. [] of 2017

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communications**



NORTHERN TERRITORY OF AUSTRALIA

Act No. [] of 2017

An Act to establish an Independent Commissioner Against Corruption, to provide for the protection of whistleblowers, to repeal the *Public Interest Disclosure Act*, and for related purposes

[Assented to [] 2017]
[Second reading [] 2017]

The Legislative Assembly of the Northern Territory enacts as follows:

Part 1 Introduction

Division 1 Preliminary matters

1 Short title

This Act may be cited as the *Independent Commissioner Against Corruption Act 2017*.

2 Commencement

This Act commences on the day fixed by the Administrator by *Gazette* notice.

3 Object of Act

The object of this Act is to address wrongdoing in, or connected with, public administration by:

- (a) preventing or minimising the occurrence of improper conduct; and
- (b) improving public confidence that improper conduct will be detected and dealt with appropriately; and

- (c) providing incentives and reducing disincentives to persons to assist in the detection, reporting, investigation, prosecution and prevention of improper conduct; and
- (d) protecting persons who put themselves at risk of harm by exposing or reporting improper conduct; and
- (e) augmenting the Territory's existing framework for responding to improper conduct by establishing an Independent Commissioner Against Corruption intended to:
 - (i) investigate the most serious, systemic and sensitive improper conduct; and
 - (ii) ensure that other improper conduct is dealt with, either by an appropriate existing entity or, if the ICAC considers it appropriate, by the ICAC; and
 - (iii) coordinate a response to improper conduct when multiple entities have jurisdiction in relation to the matter; and
 - (iv) facilitate the prosecution of offences involving improper conduct.

Note for section 3

For improper conduct – see section 9.

4 Definitions

In this Act:

Acting ICAC means a person appointed under section 118(1) or (2).

acting in an official capacity, in relation to a person, means the person is performing functions under, or otherwise related to the administration of, this Act.

anti-democratic conduct, see section 13.

Assembly Committee means the committee (if any) designated under section 5.

Australian parliament means:

- (a) the Legislative Assembly; or
- (b) the Parliament of the Commonwealth or a State; or

(c) the parliament or legislature of another Territory.

authorised officer means:

- (a) the ICAC; or
- (b) a person appointed as an authorised officer under section 128.

breach of public trust means conduct by a public body or public officer that is intentionally or recklessly inconsistent with the functions of the body or officer, including the duty of the body or officer to act in the public interest.

claimant, for Part 5, Division 2, see section 81.

claimant's representative, for Part 5, Division 2, see section 81.

Clerk, for Part 5, Division 2, see section 81.

closed session, for Part 5, Division 1, see section 75.

conduct means an act or an omission to perform an act.

connected to public affairs, in relation to conduct, means:

- (a) conduct in the course of, or closely related to, the performance of official functions, including conduct engaged in otherwise than in the performance of official functions that adversely affects or could adversely affect the honest, impartial or effective performance of those functions; or
- (b) conduct involving the use of public resources; or
- (c) conduct involving the use of authority or perceived authority that a person has as a result of being a public officer or representing themselves as a public officer.

corrupt conduct, see section 10.

eligible person:

- (a) for appointment as the ICAC – see section 111(1);
- (b) for appointment as the Inspector – see section 131(2).

engage in conduct means:

- (a) perform an act; or
- (b) omit to perform an act.

engage in retaliation, see section 92.

examination means an examination under section 32 for an investigation.

function includes duty and power.

general report means a report mentioned in section 45(1).

give evidence, for an investigation, means answer a question, give information or produce an item for the investigation.

harm:

- (a) generally – includes any of the following:
 - (i) injury, loss or damage;
 - (ii) intimidation or harassment;
 - (iii) discrimination, disadvantage or adverse treatment (including disciplinary action), in relation to employment, career, profession, trade or business; or
- (b) for protection of protected persons – see section 109(4).

health practitioner means:

- (a) a medical practitioner; or
- (b) a person registered under the Health Practitioner Regulation National Law to practise in the psychology profession (other than as a student).

ICAC means the Independent Commissioner Against Corruption established by section 15.

ICAC Minister means the minister administering this Act.

ICAC premises means premises occupied by the ICAC, the ICAC's Office or a member of ICAC staff in connection with the performance of official functions.

ICAC's Office means the Agency of that name specified in Schedule 1 to the *Public Sector Employment and Management Act*.

It is intended to amend Schedule 1 to the *Public Sector Employment and Management Act* to create the ICAC's Office as an Agency under that Act.

identifying information means information identifying, or tending to identify, a protected person.

improper conduct, see section 9.

independent entity means any of the following:

- (a) the Speaker;
- (b) the Deputy Speaker;
- (c) a court;
- (d) a judicial officer;
- (e) a board, commission, tribunal or other body established under an Act that has judicial or quasi-judicial functions in the performance of its deliberative functions;
- (f) a member of an entity mentioned in paragraph (e);
- (g) a coroner;
- (h) the Director of Public Prosecutions;
- (i) the Auditor-General;
- (j) the Ombudsman;
- (k) the Anti-Discrimination Commissioner;
- (l) the Children's Commissioner;
- (m) the Electoral Commissioner;
- (n) the Commissioner of Police in relation to a referral if:
 - (i) the matter referred does not involve an allegation of corrupt conduct of a police officer or a person employed or engaged by the Commissioner of Police; or
 - (ii) the matter referred involves an allegation of improper conduct of a police officer or a person employed or engaged by the Commissioner of Police and the ICAC considers the ICAC has no good reason to maintain oversight of the matter;
- (o) a law enforcement agency of another jurisdiction;
- (p) an agency of another Australian jurisdiction that has functions similar to those of the ICAC;
- (q) an entity prescribed, or of a class prescribed, by regulation.

Inspector means the Inspector mentioned in section 131.

investigation means an investigation under Part 3, Division 5 including a joint investigation under section 36.

investigation report means a report by the ICAC under section 47(1).

item means a document or other thing.

judicial officer means:

- (a) a Supreme Court Judge; or
- (b) a Local Court Judge; or
- (c) the Master, as defined in section 9(1) of the *Supreme Court Act*.

law enforcement agency means an entity, in the Territory or elsewhere in Australia, that has functions in relation to the investigation of offences or the prosecution of persons for offences.

local councillor means a member of a local government council.

member of ICAC staff means a person mentioned in section 120(1).

member of Inspector staff means a person mentioned in section 139(1).

misconduct, see section 11.

misleading information means information that is misleading in a material particular or because of the omission of a material particular.

MLA means member of the Legislative Assembly.

nominated recipient, see section 94.

non-disclosure direction means a direction under section 142.

occurs, in relation to conduct, means the conduct is engaged in.

official information means information known to, or held by or on behalf of, a public officer or public body in relation to official functions, whether the information:

- (a) has or has not been recorded; or

- (b) is held alone or jointly with another person or body; or
- (c) is in the Territory or elsewhere.

open session, for Part 5, Division 1, see section 75.

parliamentary privilege means a privilege, immunity or power mentioned in section 80(1).

perform a function includes exercise a power.

political party, see section 3 of the *Electoral Act*.

premises includes:

- (a) land; and
- (b) a permanent or temporary building or structure on land; and
- (c) an aircraft, vehicle or vessel.

prohibited reason, in relation to retaliation, see section 92(2).

proper officer, for Part 5, Division 2, see section 81.

protected action, see section 89.

protected communication, see section 90.

protected person:

- (a) generally – means a person who takes or has taken protected action; and
- (b) for retaliation – includes a person whom the person engaging in retaliation believes or suspects is taking or has taken protected action.

public body, see section 14(1).

public inquiry means an inquiry under Part 3, Division 6.

public inquiry report means a report by the ICAC under section 49.

public officer, see section 14(2).

public resources means:

- (a) public money, assets and infrastructure; or

- (b) intellectual property of, and licences held by, the Territory or a public body; or
- (c) human resources of the public sector; or
- (d) any other resources of, or available to, the public sector.

public statement means a statement by the ICAC under section 52.

referral means a referral of a matter by the ICAC under Part 3, Division 4.

referral entity, see section 23(2) and (6).

report concerning recommendations means a report by the ICAC under section 55.

representation, for Part 5, Division 1, see section 75.

responsible Minister, for a public body or public officer, means the minister having responsibility for the area or activity of government that is applicable to the public body or public officer.

*Note for definition **responsible Minister***

See section 19(3) of the Interpretation Act.

retaliation, see section 92.

retention notice, see section 68(1)(e).

search warrant, means a search warrant issued under section 65.

secured item, for Part 5, Division 2, see section 81.

subject of privilege, for Part 5, Division 2, see section 82.

superior Court means:

- (a) the Supreme Court; or
- (b) a Supreme Court of a State or another Territory; or
- (c) the High Court of Australia; or
- (d) the Federal Court of Australia.

unsatisfactory conduct, see section 12.

victim, in relation to retaliation, see section 92.

witness means an individual who is required to give evidence for an investigation.

Note for section 4

The Interpretation Act contains definitions and other provisions that may be relevant to this Act.

5 Assembly Committee

The Legislative Assembly may, by resolution, designate a committee of the Legislative Assembly to receive reports, and perform other functions, in relation to the ICAC.

6 Act binds Crown

This Act binds the Crown in right of the Territory and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.

7 Application of Criminal Code

Part IIAA of the Criminal Code applies to an offence against this Act.

Note for section 7

Part IIAA of the Criminal Code states the general principles of criminal responsibility, establishes general defences, and deals with burden of proof. It also defines, or elaborates on, certain concepts commonly used in the creation of offences.

Division 2 Important concepts

8 Meaning of *conduct*

- (1) Without limiting the conduct to which this Act applies, this Act extends to the following:
 - (a) conduct occurring before the commencement of this Act;
 - (b) conduct occurring outside the Territory;
 - (c) conduct engaged in:
 - (i) by a person who was a public officer at the time it was engaged in but who has since ceased to be a public officer; or
 - (ii) by an entity that was a public body at the time it was engaged in but that has since ceased to be a public body or has ceased to exist.

- (2) A public body engages in conduct if:
- (a) the conduct is engaged in by a person or body with the authority to act on behalf of the public body; or
 - (b) the conduct occurs and a person or body with the authority to act on behalf of the public body expressly, tacitly or impliedly authorises or permits it to occur; or
 - (c) the conduct occurs and a corporate culture exists in the public body that directs, encourages, tolerates or leads to it occurring; or
 - (d) the conduct occurs and the public body has failed to create and maintain a corporate culture to deter or prevent it occurring.

Note for section 8

*See also section 4, definitions **conduct**, **engage in conduct** and **occurs**.*

9 **Meaning of *improper conduct***

- (1) Each of the following is ***improper conduct***:
- (a) corrupt conduct;
 - (b) misconduct;
 - (c) unsatisfactory conduct;
 - (d) anti-democratic conduct;
 - (e) conduct constituting an offence against this Act;
 - (f) conduct (the ***secondary conduct***) engaged in by any person in relation to conduct mentioned in paragraph (a) to (e) (the ***primary conduct***) as provided by subsection (2).
- (2) For subsection (1)(f), ***secondary conduct*** is conduct that would constitute an offence against one of the following sections of the Criminal Code on the assumption that the primary conduct is an offence, whether or not the primary conduct is in fact an offence:
- (a) section 43BF (attempt);
 - (b) section 43BG (complicity and common purpose);
 - (c) section 43BH (innocent agency);
 - (d) section 43BI (incitement);

- (e) section 43BJ (conspiracy).
- (3) Secondary conduct is taken to be the same type of improper conduct as the primary conduct to which it relates.

Examples for section 9

- 1 *An attempt to engage in corrupt conduct would be improper conduct, whether or not the corrupt conduct is itself an offence.*
- 2 *An attempt to engage in corrupt conduct would also be corrupt conduct.*

10 Meaning of **corrupt conduct**

- (1) Conduct is **corrupt conduct** if it is conduct engaged in by a public officer (whether or not the identity of the public officer is known) or by a public body:
- (a) that constitutes an offence, whether in the Territory or elsewhere, for which the maximum penalty is imprisonment for a term of at least 2 years, with or without a fine; and
- (b) that is connected to public affairs.

Note for subsection (1)(b)

*See section 4, definition **connected to public affairs**.*

- (2) Conduct is also **corrupt conduct** if it is conduct engaged in by a public officer other than a minister, an MLA or a local councillor (whether or not the identity of the public officer is known):
- (a) that constitutes reasonable grounds for dismissing or terminating the services of the public officer; and
- (b) that is connected to public affairs; and
- (c) that involves or results in any of the following:
- (i) dishonesty;
- (ii) failure to manage adequately an actual or perceived conflict of interest;
- (iii) a breach of public trust;
- (iv) the illegal, unauthorised or otherwise inappropriate performance of official functions;
- (v) inappropriate conduct in relation to official information;

- (vi) an adverse effect on the honest, impartial or effective performance of official functions by any public officer or public body or group of public officers or public bodies.
- (3) Conduct is also **corrupt conduct** if it is conduct engaged in by a public body, a minister, an MLA or a local councillor:
- (a) that is connected to public affairs; and
 - (b) that involves a serious breach of public trust by the public body, minister, MLA or councillor.
- (4) Conduct is also **corrupt conduct** if it is conduct engaged in by a person (whether or not a public officer or public body) that could impair public confidence in public administration and that involves any of the following:
- (a) collusive tendering;
 - (b) intentionally or recklessly providing false or misleading information in relation to an application for a licence, permit or other authority under legislation designed to:
 - (i) promote or protect health and safety, public health, the environment or the amenity of an area; or
 - (ii) facilitate the management and commercial exploitation of resources;
 - (c) misappropriating or misusing public resources;
 - (d) assisting in, or dishonestly benefitting from, the misappropriation or misuse of public resources;
 - (e) dishonestly obtaining or retaining employment or appointment as a public officer.
- (5) Conduct is also **corrupt conduct** if it is conduct engaged in by a person (whether or not a public officer or public body):
- (a) that constitutes:
 - (i) an offence against Part IV, Divisions 1 to 5 of the Criminal Code; or
 - (ii) an offence against section 118 or 119 of the Criminal Code; or
 - (iii) an offence prescribed by regulation; and

- (b) that adversely affects, directly or indirectly, the honest, impartial or effective performance of official functions by any public officer or public body or group of public officers or public bodies.
- (6) For subsection (2)(c)(ii), **conflict of interest** includes the obtaining of a benefit by, or the causing of a detriment to, a person or body, including:
- (a) any benefit or detriment, whether pecuniary or otherwise; and
 - (b) placing the person or body in a stronger or weaker position in relation to a reasonably foreseeable future benefit or detriment.
- (7) For subsection (4), in determining whether conduct could impair public confidence in public administration it is irrelevant whether or not the conduct is likely to become public knowledge.

11 Meaning of **misconduct**

- (1) Conduct is **misconduct** if it is conduct engaged in by a public officer (whether or not the identity of the public officer is known) or by a public body:
- (a) that constitutes an offence, whether in the Territory or elsewhere, for which the maximum penalty is:
 - (i) a fine; or
 - (ii) imprisonment for a term of less than 2 years, with or without a fine; and
 - (b) that is connected to public affairs.

Note for subsection (1)(b)

*See section 4, definition **connected to public affairs**.*

- (2) Conduct is also **misconduct** if it is conduct engaged in by a public officer other than a judicial officer, a minister, an MLA or a local councillor (whether or not the identity of the public officer is known):
- (a) that constitutes reasonable grounds for taking disciplinary action against the officer (short of dismissal or termination of appointment) or varying the terms of the officer's appointment; and
 - (b) that is connected to public affairs; and
 - (c) that is conduct mentioned in section 10(2)(c).

- (3) Conduct is also ***misconduct*** if it is conduct engaged in by a public body, a judicial officer, a minister, an MLA or a local councillor:
- (a) that is connected to public affairs; and
 - (b) that involves:
 - (i) for a judicial officer – a breach of public trust; or
 - (ii) for a public body, minister, MLA or councillor – a breach of public trust not amounting to a serious breach of public trust.

12 Meaning of ***unsatisfactory conduct***

- (1) Conduct is ***unsatisfactory conduct*** if it is conduct engaged in by a public officer (whether or not the identity of the public officer is known) or by a public body:
- (a) that involves:
 - (i) illegality or impropriety; or
 - (ii) negligence; or
 - (iii) incompetence; and
 - (b) that is connected to public affairs; and
 - (c) that results in:
 - (i) substantial mismanagement of public resources; or
 - (ii) the inappropriate or significantly inefficient use of public resources; or
 - (iii) substantial mismanagement in relation to the performance of official functions; or
 - (iv) substantial detriment to the public interest.
- (2) For subsection (1)(a)(iii), ***incompetence***:
- (a) is conduct that would not be engaged in by a reasonable public officer or public body:
 - (i) having the skills and knowledge reasonably expected of a person or body with the role of the public officer or public body; and

- (ii) having taken appropriate steps to obtain adequate resources, information and advice; but
- (b) does not include conduct:
 - (i) that is less than best practice; or
 - (ii) that is a matter of policy about which reasonable public officers or public bodies may disagree.
- (3) Despite subsection (1), unsatisfactory conduct does not include any conduct engaged in by a judicial officer in the performance of judicial functions.

13 Meaning of *anti-democratic conduct*

- (1) Conduct is ***anti-democratic conduct*** if it is conduct engaged in by a person or body (whether or not a public officer or public body) that:
 - (a) constitutes an offence against the *Electoral Act* or Chapter 8 of the *Local Government Act*; and
 - (b) affects, or is part of a course of conduct aimed at affecting:
 - (i) the behaviour of the community or multiple members of the community in relation to voting in elections; or
 - (ii) the reputation, power or influence, or resources of a political party or a candidate for election; or
 - (iii) the ability of the public to ascertain the resources and associated entities of a political party or the resources of a candidate for an election; or
 - (iv) the Electoral Commissioner's ability to detect and investigate contraventions of the *Electoral Act* or Chapter 8 of the *Local Government Act* and generally to ensure compliance with those Acts.

Examples for subsection (1)

- 1 *An offence against section 271 of the Electoral Act (push-polling) that is intended to influence the votes of multiple electors or affect the reputation of a political party or candidate for election.*
 - 2 *An offence against section 215 of the Electoral Act (failing to make return regarding donations, gifts or expenditure) affecting the ability of the public to ascertain the resources or associated entities of a political party.*
- (2) Subsection (1)(b)(ii) extends to conduct occurring before the political party was formed or before the candidate for election became a candidate.

(3) In this section:

associated entity, see section 176 of the *Electoral Act*.

resources includes loans, gifts and donations, whether monetary or otherwise.

14 Meaning of **public body** and **public officer**

(1) Each of the following is a **public body**:

- (a) an Agency;
- (b) a local government council;
- (c) the Police Force;
- (d) a court;
- (e) a board, commission, tribunal or other body established under an Act that has judicial or quasi-judicial functions in the performance of its deliberative functions;
- (f) a body, whether incorporated or not, established under an Act for a public purpose;
- (g) a body whose members, or a majority of whose members, are appointed by the Administrator or a minister;
- (h) a government owned corporation;
- (i) a nursing home;
- (j) a public hospital;
- (k) a university;
- (l) a body, whether incorporated or not:
 - (i) supported directly or indirectly by government funds or other assistance; or
 - (ii) performing a public function on behalf of the Territory, a public body or a public officer (whether under contract or otherwise).

(2) Subject to subsection (3), each of the following is a **public officer**.

- (a) a minister;
- (b) an MLA;

- (c) a judicial officer;
- (d) the holder of an office established under an Act who is appointed by the Administrator or a minister;
- (e) a member, officer or employee of a public body;
- (f) a person engaged, whether under the *Contracts Act* or otherwise, by or on behalf of a person mentioned in paragraphs (a) to (e) in relation to the performance of official functions.

Examples for subsection (2)

Each of the following is a public officer:

- (a) a member of NTCAT;
- (b) a public sector employee;
- (c) a police officer;
- (d) a statutory office holder;
- (e) an adviser to, or electorate officer of, a minister or an MLA;
- (f) a local councillor;
- (g) a local council employee.

(3) The following are not public officers:

- (a) the Inspector;
- (b) a member of Inspector staff in relation to the performance of official functions for the Inspector;
- (c) an Acting ICAC appointed to investigate the ICAC, the ICAC's Office or a member of ICAC staff, in relation to the investigation;
- (d) a member of ICAC staff assisting an Acting ICAC appointed to investigate the ICAC, the ICAC's Office or a member of ICAC staff, in relation to the investigation.

(4) In this section:

court means the Supreme Court or the Local Court.

nursing home, see section 5 of the *Medical Services Act*.

Police Force, see section 4(1) of the *Police Administration Act*.

public hospital means premises declared under section 6(2) of the *Medical Services Act* to be a hospital, other than a hospital conducted under a licence granted under the *Private Hospitals Act*.

university means:

- (a) Charles Darwin University; or
- (b) Batchelor Institute of Indigenous Tertiary Education.

Part 2 Independent Commissioner Against Corruption

15 Establishment of ICAC

There is to be an Independent Commissioner Against Corruption.

Note for section 15

Part 7, Division 1 deals with the appointment of the ICAC and related matters.

16 Functions

- (1) The ICAC has the following functions:
 - (a) to identify and investigate improper conduct;
 - (b) to protect persons who have assisted or may assist in detecting, preventing, investigating or otherwise responding to improper conduct;
 - (c) to prevent, detect and respond to improper conduct by:
 - (i) developing and delivering education and training; and
 - (ii) auditing or reviewing practices, policies and procedures of public bodies and public officers; and
 - (iii) developing and delivering advice, reports, information and recommendations; and
 - (iv) referring matters to another entity for investigation or further investigation, disciplinary action or prosecution; and
 - (v) making public comment;
 - (d) to oversee and direct, as required, how referral entities deal with matters referred to them by the ICAC;
 - (e) to perform other functions conferred on the ICAC under this or another Act.

- (2) While the ICAC may perform functions under this Act in relation to any matter that may involve improper conduct, it is intended that:
 - (a) the ICAC is primarily to investigate only matters that, in the ICAC's opinion, may involve corrupt conduct or serious anti-democratic conduct; and
 - (b) the ICAC should refer all other matters that may involve improper conduct to another entity, unless there is a good reason for the ICAC to deal with the matter.
- (3) Without limiting subsection (2)(b), it is a good reason for the ICAC not to refer a matter to another entity if referring the matter:
 - (a) may adversely affect the performance or future performance of the ICAC's functions; or
 - (b) may reveal the identity of a protected person.
- (4) Subject to this Act, the ICAC may perform the ICAC's functions in any manner the ICAC considers appropriate.

17 Powers

The ICAC may do all things necessary or convenient to be done for, or in relation to, the performance of the ICAC's functions.

Note for section 17

*A reference in this Act to a function includes a reference to a power, and performing a function includes exercising a power – see section 4, definitions **function** and **perform**.*

18 ICAC to act in public interest

- (1) The ICAC is to act in the public interest in performing the ICAC's functions under this Act, taking into account the matters set out in Schedule 1 that the ICAC considers relevant and appropriate in any particular case.
- (2) Subject to subsection (3), this section does not create any legal rights in any person or give rise to any civil cause of action.
- (3) Subsection (2) does not affect a person's right to seek judicial review of administrative action by the ICAC.

19 Independence of ICAC

The ICAC is not subject to direction by any person about:

- (a) the way the ICAC performs the ICAC's functions under this Act; or

- (b) the priority given to any particular matters.

Part 3 Identifying and dealing with improper conduct

Division 1 Mandatory reporting of suspected improper conduct

20 ICAC to establish system for mandatory reporting

- (1) The ICAC must issue, and keep under review, directions and guidelines governing reporting to the ICAC of improper conduct.
- (2) Directions may:
- (a) require a public body or public officer to report suspected improper conduct; and
 - (b) set out the circumstances that constitute suspicion for paragraph (a); and
 - (c) require matters to be reported even if they have been referred to the public body or public officer under another Act.

Note for subsection (2)

The directions and guidelines must be published on the ICAC's website – see section 127.

- (3) Without limiting the directions, they may require different classes of public bodies and public officers to disclose different classes of suspected improper conduct.

Examples for subsection (3)

A direction could require:

- (a) *all public officers engaged on an executive contract of employment under the Public Sector Employment and Administration Act to report suspected corrupt conduct and suspected serious or systemic misconduct or unsatisfactory conduct; or*
 - (b) *all correctional officers under the Correctional Services Act to report suspected improper conduct related to youth detainees.*
- (4) The ICAC must issue the directions and guidelines within 6 months after the commencement of this section.
- (5) A public body or public officer:
- (a) must report to the ICAC in accordance with the directions; and
 - (b) may report to the ICAC any suspected improper conduct.

Division 2 Audits and reviews

21 Audits and reviews

- (1) The ICAC may, at any time, audit or review the practices, policies or procedures of a public body or public officer to identify whether improper conduct has occurred, is occurring or is at risk of occurring.
- (2) Despite subsection (1), the ICAC cannot audit or review the practices, policies and procedures of a court or judicial officer in relation to the performance of judicial functions.
- (3) For an audit or review, the ICAC may exercise the powers in Part 4.

Note for section 21

The ICAC may report on an audit or review – see section 45(1)(a).

Division 3 Preliminary inquiries

22 Preliminary inquiries

- (1) The ICAC may, at any time, make preliminary inquiries to determine whether:
 - (a) to refer or investigate a matter that has come to the ICAC's attention that may involve improper conduct; or
 - (b) to make a recommendation, general report or public statement; or
 - (c) to otherwise perform the ICAC's functions in relation to improper conduct.
- (2) For preliminary inquiries, the ICAC may do any of the following:
 - (a) collect or receive information from any source;
 - (b) exercise the powers in Part 4.

Division 4 Referrals

23 Referral to referral entity

- (1) The ICAC may, at any time, refer to a referral entity a matter that has come to the ICAC's attention that may involve improper conduct.

Note for subsection (1)

See also section 16(2).

(2) A **referral entity** is an entity specified in the following Table opposite the person or body whose conduct the matter concerns.

Table

Matter concerning conduct of	Referral entity
Chief Justice	next senior Supreme Court Judge
any other Supreme Court Judge	Chief Justice
Chief Judge	Chief Justice
any other Local Court Judge	Chief Judge
Speaker	Deputy Speaker
any other MLA (including a minister)	Speaker
Commissioner of Police	Ombudsman Minister administering Part II of the <i>Police Administration Act</i> Anti-Discrimination Commissioner
any other police officer	Ombudsman Commissioner of Police Anti-Discrimination Commissioner
any other person or body	a public body the holder of an office established under an Act who is appointed by the Administrator or a minister a law enforcement agency an agency of another Australian jurisdiction that has functions similar to those of the ICAC an entity in Australia that regulates, or has oversight of standards for: <ul style="list-style-type: none"> (a) a profession, trade, occupation or group; or (b) a type of organisation (for example, corporations or incorporated associations)

Matter concerning conduct of	Referral entity
	an entity prescribed, or of a class prescribed, by regulation

- (3) If a matter concerning the conduct of a police officer is referred to the Commissioner of Police, the Commissioner of Police must notify the Ombudsman of the referral.
- (4) The ICAC may refer a matter to more than one referral entity or parts of the same matter to different referral entities.
- (5) Without limiting subsection (1), the ICAC may, at any time:
- (a) refer a matter that may involve the commission of an offence to the Commissioner of Police or another law enforcement agency having jurisdiction to investigate the offence; or
 - (b) refer a matter to the Director of Public Prosecutions:
 - (i) to seek the Director's opinion or advice; or
 - (ii) to request the Director to grant an indemnity from prosecution; or
 - (c) refer a matter that may involve anti-democratic conduct to the Electoral Commissioner.
- (6) Without limiting subsection (2), each of the following entities is a **referral entity** in relation to a matter referred, or that may be referred, to the entity under subsection (5):
- (a) the Commissioner of Police;
 - (b) a law enforcement agency;
 - (c) the Director of Public Prosecutions;
 - (d) the Electoral Commissioner.

24 Consultation before referral

The ICAC may consult a referral entity in deciding whether to make a referral to the entity.

25 Information to be provided with referral

- (1) The ICAC may provide or disclose to a referral entity any information the ICAC has in relation to a matter referred or that may be referred to the entity.

- (2) The ICAC is under no obligation to disclose to the referral entity the original source of any information.

26 Directions to referral entity

- (1) Subject to this section, the ICAC may give directions to a referral entity in relation to the referral, including directions as to:
- (a) how the referral entity is to deal with the matter; and
 - (b) reporting requirements of the referral entity in relation to the matter.
- (2) Except as provided by subsection (3), the ICAC cannot give directions under subsection (1) to an independent entity.
- (3) The ICAC may give directions to an independent entity, other than the Speaker or Deputy Speaker, requiring the entity to report to the ICAC on the actions taken by the entity on the referral and the outcome of those actions.
- (4) 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.

27 Referral entity may disclose information to ICAC

Despite any obligation of non-disclosure on a referral entity, the referral entity may disclose information to the ICAC in relation to a referral or potential referral to the entity.

28 Withdrawal or suspension of referral

The ICAC may, at any time, by written notice to a referral entity other than an independent entity:

- (a) withdraw a referral; or
- (b) require the referral entity to suspend dealing with, or taking particular action in relation to, the matter referred:
 - (i) for the period specified by the ICAC; or
 - (ii) until further notice from the ICAC.

Division 5 Investigations

29 Power to investigate

- (1) The ICAC may commence an investigation if the ICAC has, or is aware of, information that, if true, would tend to show that improper conduct has occurred, is occurring or is at risk of occurring.

Note for subsection (1)

See also section 16(2).

- (2) The ICAC may commence an investigation:
- (a) despite a provision of another law of the Territory providing that the subject matter is final or cannot be appealed against, challenged or called into question; and
 - (b) even if the subject matter is the subject of:
 - (i) a referral; or
 - (ii) an investigation under another law of the Territory; or
 - (iii) legal proceedings.

Note for subsection (2)(b)(ii) and (iii)

Whether the subject matter is the subject of another investigation or of legal proceedings are matters to which the ICAC is to take into account – see Schedule 1, clause 3(b) and (c).

- (3) If the ICAC has, or is aware of, information that, if true, would not itself amount to improper conduct but may be directly or indirectly connected with improper conduct, or be part of a course of activity involving improper conduct, the ICAC may commence an investigation based on the information.
- (4) For an investigation, the ICAC may exercise the powers in Part 4 in addition to any powers in this Division or Division 6.

30 Power to require information and items for investigation

- (1) For an investigation, the ICAC may require a person:
- (a) to answer specified questions or provide specified information; or
 - (b) to produce specified items, or items of a specified kind, in the person's possession or control.

- (2) When making a requirement, the ICAC must state the nature of the matters about which the person is to be questioned, or to which the information or items relate, except to the extent the ICAC considers on reasonable grounds doing so would:
 - (a) be likely to prejudice the conduct of the investigation; or
 - (b) be contrary to the public interest.
- (3) A requirement under subsection (1) may be made:
 - (a) if an oral response to a question is required – orally; or
 - (b) otherwise – by written notice.
- (4) A written notice to provide information or produce an item may require the person to verify the information or item by statutory declaration.
- (5) If an item is produced to the ICAC in connection with an investigation:
 - (a) the ICAC may retain possession of the item for a reasonable period and may make copies of, or take extracts from, the item; and
 - (b) while the item remains in the ICAC's possession, the ICAC must allow the owner reasonable access to the item.

Note for section 30

Section 143 creates an offence for failing to comply with a requirement under this section.

31 Power to inspect financial records

- (1) For an investigation, the ICAC may give a written notice to a deposit holder requiring the deposit holder to permit a person specified in the notice to inspect and take copies of financial records.
- (2) The notice must be given to the deposit holder not less than 3 days before the inspection is to occur, unless the ICAC otherwise directs.
- (3) For the inspection, the person specified in the notice may give directions to, or impose requirements on, the deposit holder or an officer or employee of the deposit holder.
- (4) The ICAC must keep a record of each notice and inspection under this section that identifies:
 - (a) the investigation to which the inspection relates; and

(b) the relevance of the inspection to the investigation.

(5) In this section:

deposit holder means:

- (a) an ADI; or
- (b) a friendly society; or
- (c) a person who, or body that, holds money in accounts on behalf of other persons; or
- (d) a person who carries on business as a pawnbroker; or
- (e) an institution of a kind prescribed by regulation.

financial records means any of the following in the possession or control of a deposit holder:

- (a) books of account, accounts and accounting records (including working papers and other items necessary to explain the methods and calculations by which accounts are made up);
- (b) books, diaries or other records used in the course of carrying on the business of a deposit holder;
- (c) cheques, bills of exchange, promissory notes, deposit slips, orders for the payment of money, invoices, receipts and vouchers;
- (d) securities and documents of title to securities.

32 Power to require person to attend for examination

- (1) For an investigation, the ICAC may require a person to attend the ICAC for examination.
- (2) The person must be given a written notice:
 - (a) requiring the person to attend for examination at a specified time and place; and
 - (b) stating the nature of the matters about which the person is to be questioned, except to the extent the ICAC considers on reasonable grounds doing so would:
 - (i) be likely to prejudice the conduct of the investigation; or
 - (ii) be contrary to the public interest; and

- (c) if the person is under investigation – stating that fact.
- (3) The notice may require the person to bring and produce to the ICAC specified items, or items of a specified kind, in the person's possession or control relevant to the investigation.
- (4) The ICAC may require a witness at an examination to do one or more of the following:
 - (a) take an oath to answer all questions truthfully;
 - (b) answer a question relevant to the investigation asked by the ICAC or by another person present at the examination;
 - (c) produce at the examination any items in the possession or control of the witness relevant to the investigation.

Note for section 32

Section 144 creates an offence for contravening a requirement under this section.

33 Examination to be held in private

An examination must be held in private.

34 Legal or other representation

- (1) A witness at an examination may request the ICAC to allow the witness to be represented by a legal practitioner or agent.
- (2) The ICAC must grant a request for legal representation unless the ICAC believes on reasonable grounds that the presence of the legal practitioner would:
 - (a) be likely to prejudice the conduct of the investigation; or
 - (b) be contrary to the public interest.
- (3) The ICAC may grant a request for representation by an agent other than a legal practitioner if the ICAC considers it appropriate to do so.
- (4) The legal practitioner or agent may:
 - (a) make submissions to the ICAC; and
 - (b) with the ICAC's approval, ask the witness questions relevant to the investigation.

35 Interpreters

A witness at an examination may be assisted by an interpreter or another person necessary to make the proceeding intelligible to the witness, unless the ICAC believes on reasonable grounds that the presence of the interpreter or other person would:

- (a) be likely to prejudice the conduct of the investigation; or
- (b) be contrary to the public interest.

36 Joint investigations

- (1) The ICAC may conduct an investigation as a joint investigation with a referral entity in relation to a matter, whether or not the ICAC has referred the matter to the entity under Division 4.
- (2) For a joint investigation, the ICAC must enter into an agreement with the referral entity setting out the arrangements for the joint investigation, including:
 - (a) the respective responsibilities of the ICAC and the referral entity in relation to the joint investigation; and
 - (b) proposed timelines for the joint investigation; and
 - (c) information-sharing between the ICAC and the referral entity in relation to the joint investigation.
- (3) The ICAC or the referral entity may, at any time, do anything in relation to the subject matter of the investigation that the ICAC or entity could have done but for the agreement.

Example for subsection (3)

The ICAC could investigate the subject matter, or part of the subject matter, of a joint investigation as a separate investigation under this Division without involving the referral entity.

- (4) The ICAC or referral entity must inform the other party to the agreement if the ICAC or referral entity wishes to terminate the agreement or depart substantially from any of its terms.
- (5) Failure to enter an agreement under subsection (2), abide by the terms of the agreement or notify the other party under subsection (4) does not invalidate or otherwise affect anything done by the ICAC or referral entity in relation to the investigation.

Division 6 Public inquiries

37 Public inquiries

- (1) The ICAC may hold a public inquiry for an investigation.
- (2) The ICAC must make a public announcement of the public inquiry setting out:
 - (a) the general scope and purpose of the inquiry; and
 - (b) the time and place of the inquiry.

38 Public inquiries generally to be open to public

A public inquiry is to be open to the public unless the ICAC directs otherwise under section 44.

39 Power to require attendance

Section 32 applies in relation to a public inquiry as if a reference in that section to an examination were a reference to a public inquiry.

40 Appearance generally

- (1) A person or body may apply to the ICAC to appear at a public inquiry.
- (2) The ICAC may permit the person or body to appear if the person or body satisfies the ICAC that it is appropriate for the person or body to appear at the public inquiry.
- (3) A person or body appearing at a public inquiry, or their legal practitioner or agent (if any), may:
 - (a) make submissions to the ICAC; and
 - (b) with the ICAC's approval, ask witnesses questions relevant to the inquiry.

41 Right of response if adverse allegations made

- (1) If, at a public inquiry, allegations are made against a person or body that, if true, could reasonably affect the ICAC's findings on the subject matter of the inquiry, the ICAC must give the person or body a reasonable opportunity to respond to the allegations.
- (2) The ICAC may determine whether the opportunity to respond is to be given by allowing the person or body to make written submissions to the inquiry or appear at the inquiry or both.

42 Legal or other representation

- (1) A witness, or another person or body appearing, at a public inquiry may request the ICAC to allow the witness, person or body to be represented by a legal practitioner or agent.
- (2) The ICAC must grant a request for legal representation unless the ICAC believes on reasonable grounds that the presence of the legal practitioner would:
 - (a) be likely to prejudice the conduct of the investigation; or
 - (b) be contrary to the public interest.
- (3) The ICAC may grant a request for representation by an agent other than a legal practitioner if the ICAC considers it appropriate to do so.

43 Interpreters

A witness or person appearing at a public inquiry may be assisted by an interpreter or another person necessary to make the proceeding intelligible to the witness or person appearing, unless the ICAC believes on reasonable grounds that the presence of the interpreter or other person would:

- (a) be likely to prejudice the conduct of the investigation; or
- (b) be contrary to the public interest.

44 Directions for private hearing and non-publication

For a public inquiry, the ICAC may give any of the following directions:

- (a) a direction that the inquiry, or part of it, be held in private;
- (b) a direction prohibiting or restricting the publication of information that would enable a witness or person or body appearing to be identified or contacted;
- (c) a direction prohibiting or restricting the publication of evidence given at the inquiry;
- (d) a direction excluding a person from the inquiry or part of it.

Note for section 44

Section 145 creates an offence for contravening a direction under this section.

Division 7 Reports, public statements and recommendations

45 General report

- (1) The ICAC may, at any time, make a report in relation to any of the following:
- (a) an audit or review carried out under section 21;
 - (b) systemic issues the ICAC has identified in one or more public bodies in relation to improper conduct;
 - (c) matters the ICAC believes on reasonable grounds may be affecting the incidence of improper conduct in one or more public bodies;
 - (d) the reporting of improper conduct by public bodies and public officers, including the following:
 - (i) the adequacy of reporting and of mechanisms to enable or encourage reporting;
 - (ii) the extent to which reporting is encouraged and supported;
 - (iii) the impact on persons who report or assist in dealing with improper conduct;
 - (e) matters that the ICAC considers have seriously affected, or may seriously affect, the ICAC's ability to perform the ICAC's functions, including the following:
 - (i) intentional or unintentional obstruction of the ICAC;
 - (ii) unexpected events;
 - (iii) current or proposed laws of the Territory;
 - (iv) adequacy of resources available to the ICAC.

Note for subsection (1)

A general report may contain recommendations – see section 53.

- (2) A general report must contain information as to the factual basis on which the ICAC expresses any opinions in the report, but the ICAC is not required to include details about specific investigations, unless the ICAC considers it in the public interest to do so.

- (3) The ICAC must not:
- (a) make a general report about the processes or procedures by which judicial decisions are made; or
 - (b) in a general report take issue with the merits of a judicial decision.
- (4) A general report may be made to:
- (a) a public body or public officer that the ICAC considers would be assisted by the report; or
 - (b) the Speaker.

46 Publication of general report made to Speaker

- (1) This section applies in relation to a general report made to the Speaker.
- (2) The Speaker must table a copy of the report in the Legislative Assembly within 6 sitting days after the Speaker receives the report.
- (3) The ICAC may include in the report a recommendation that the report be made public immediately.
- (4) If the report contains a recommendation mentioned in subsection (3), the Speaker may make the report public whether or not the Legislative Assembly is in session and whether or not the report has been tabled.
- (5) If the report is made public under subsection (4) before it is tabled, the report attracts the same privileges and immunities as it would if it had been tabled.

47 Investigation report

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

Note for subsection (1)

An investigation report may contain recommendations – see section 53.

- (2) If the ICAC proposes to make an adverse finding about a person or body in an investigation report, the ICAC must give the person or body a reasonable opportunity to respond to the adverse material and include a fair representation of the response in the report.

(3) For an investigation report made to the Speaker or Deputy Speaker, the Speaker or Deputy Speaker must table a copy of the report in the Legislative Assembly on the next sitting day after the Speaker or Deputy Speaker receives the report.

(4) In this section:

responsible authority means:

(a) for a public body or public officer other than a minister or an MLA:

(i) an entity having authority to deal with one or more matters relating to improper conduct the subject of the investigation to which the report relates; or

(ii) an entity whose functions include making future decisions in the public interest that may be better informed by receipt of the investigation report; or

(b) for a minister or an MLA other than the Speaker – the Speaker; or

(c) for the Speaker – the Deputy Speaker.

48 Brief of evidence

Following an investigation, the ICAC may provide a brief of evidence:

(a) to a law enforcement agency for the purpose of investigating, or prosecuting a person for, an offence; or

(b) to a public body or public officer for the purpose of investigating whether disciplinary action should be taken, or taking disciplinary action, against a public officer.

49 Public inquiry report

(1) If the ICAC holds a public inquiry, the ICAC must make a report on the inquiry within 3 months after its conclusion.

(2) A public inquiry report:

(a) may 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) without limiting paragraph (a), may include:
- (i) 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; and
 - (ii) a finding as to whether a person has engaged in, is engaging in or is about to engage in improper conduct.

Note for subsection (2)

A public inquiry report may contain recommendations – see section 53.

- (3) However, a public inquiry report must not include a finding:
- (a) as to whether a person has committed, is committing or is about to commit an offence or a breach of discipline; or
 - (b) as to the prospects of success of any current or future prosecution or disciplinary action.
- (4) If the ICAC proposes to make an adverse finding about a person or body in a public inquiry report, the ICAC must give the person or body a reasonable opportunity to respond to the adverse material and include a fair representation of the response in the report.
- (5) A public inquiry report is to be given to the Speaker, who must table a copy of the report in the Legislative Assembly on the next sitting day after the Speaker receives the report.
- (6) The ICAC may make one or more further reports under this section in relation to a public inquiry if the ICAC considers it is appropriate to do so in the circumstances.

50 Report to Minister concerning referral

- (1) If the ICAC has referred a matter to a referral entity, the ICAC may make a report at any time about the referral including, but not limited to, the following:
- (a) the nature of the matter referred;
 - (b) any failure by the referral entity to follow a direction of the ICAC in relation to the referral;
 - (c) any other concerns of the ICAC about the referral entity's response to the referral.

Note for subsection (1)

A report may contain recommendations – see section 53.

- (2) A report is to be made:
- (a) for a referral entity that is a public body or public officer – to the responsible Minister for the public body or public officer; or
 - (b) otherwise – to the ICAC Minister.

51 Report to Assembly concerning referral

- (1) This section applies if:
- (a) the ICAC has made a report under section 50; and
 - (b) either:
 - (i) the minister to whom the report is made provides a written response to the ICAC; or
 - (ii) the minister to whom the report is made does not provide a written response within a reasonable time; and
 - (c) the ICAC is not satisfied with the minister's response (if any).
- (2) The ICAC may make a report on the referral:
- (a) to the Assembly Committee; or
 - (b) if there is no Assembly Committee – to the Speaker.
- (3) The report:
- (a) may contain as much information as the ICAC considers appropriate in relation to the referral; and
 - (b) must contain a fair representation of any response provided by the minister.

Note for subsection (3)

The report may contain recommendations – see section 53.

- (4) The chairperson of the Assembly Committee or the Speaker must table a copy of the report in the Legislative Assembly within 6 sitting days after the chairperson or Speaker receives the report.

52 Public statements

- (1) This section applies in relation to a particular matter that the ICAC is dealing with or has dealt with, including a matter the ICAC has referred to a referral entity.

- (2) The ICAC may make a statement in relation to the matter for any of the following purposes:
 - (a) to provide information about action taken or that may be taken by the ICAC in relation to the matter;
 - (b) to indicate that it would be inappropriate for the ICAC to comment on the matter;
 - (c) to refuse to confirm or deny anything in relation to the matter;
 - (d) to seek evidence in relation to the matter in the course of preliminary inquiries into, or an investigation of, the matter;
 - (e) to provide information about a referral, including the outcome of the referral;
 - (f) to address public misconception about a person or issue of which the ICAC has particular knowledge;
 - (g) to request the Legislative Assembly to authorise the publication, or disclosure to the ICAC, of information or an item that is or may be the subject of parliamentary privilege.
- (3) The ICAC may make a public statement, in a manner determined by the ICAC, to:
 - (a) the public at large; or
 - (b) a section of the public; or
 - (c) a particular person or body.

53 Recommendations

- (1) The ICAC may, at any time, make recommendations to a public body or public officer in relation to preventing, detecting, investigating, prosecuting or otherwise dealing with improper conduct, if the ICAC considers the recommendations are within the functions of the body or officer to implement or progress.
- (2) Recommendations must be in writing and may be contained in a report under this Division.
- (3) If recommendations are made in relation to an investigation, the ICAC must:
 - (a) identify in the recommendations the investigation to which they relate; and

- (b) provide information to assist the public body or public officer to understand why the recommendations have been made and what they are intended to achieve.

54 Dealing with recommendations

- (1) The ICAC may request a public body or public officer to whom recommendations have been made to give written notice to the ICAC, within a reasonable time specified in the notice, of:
 - (a) the steps taken or proposed to be taken to implement the recommendations; or
 - (b) if no steps, or only some steps, have been taken or are proposed to be taken, the reasons for not taking all the steps necessary to implement the recommendations.
- (2) If the ICAC is not satisfied that adequate steps have been taken to implement the recommendations within a reasonable time as specified, the ICAC, after considering any comments made by the public body or public officer, may:
 - (a) if the public officer is a minister – make a report concerning recommendations under section 55; or
 - (b) otherwise:
 - (i) give a copy of the recommendations and a copy of the comments to the responsible Minister for the public body or public officer; and
 - (ii) invite the responsible Minister to provide a written response to the ICAC within a reasonable time specified in the invitation.
- (3) This section does not apply to recommendations made in a general report mentioned in section 45(4)(b).

55 Report concerning recommendations

- (1) This section applies if, under section 54(2)(b), the ICAC has given the responsible Minister for a public body or public officer a copy of recommendations and comments and:
 - (a) the responsible Minister provides a written response to the ICAC; or
 - (b) the responsible Minister does not provide a written response within the time specified under section 54(2)(b)(ii).

- (2) This section also applies as mentioned in section 54(2)(a).
- (3) The ICAC may make a report concerning the recommendations to the ICAC Minister.
- (4) A report concerning recommendations:
 - (a) may contain as much information as the ICAC considers appropriate regarding the reasons for the recommendations and the context in which they were made; and
 - (b) must contain a fair representation of:
 - (i) any reasons provided by the public body or public officer for not taking all the steps necessary to implement the recommendations; and
 - (ii) any response provided by the responsible Minister for the public body or public officer.
- (5) The ICAC Minister must table a copy of the report concerning recommendations in the Legislative Assembly within 6 sitting days after the ICAC Minister receives the report.

56 Certain reports and public statements not to contain inadmissible material

- (1) This section applies to the following:
 - (a) a general report;
 - (b) an investigation report made to the Speaker or Deputy Speaker;
 - (c) a public inquiry report;
 - (d) a report under section 51;
 - (e) a report concerning recommendations;
 - (f) a public statement.
- (2) The report or public statement must not contain any material that would not be admissible in civil, criminal or disciplinary proceedings because of section 79, unless the material is already in the public domain.
- (3) Subsection (2) does not prevent the ICAC from commenting on, or drawing inferences from, the absence of any exculpatory evidence if the ICAC could otherwise do so but for subsection (2).

Division 8 Miscellaneous matters

57 Rules of evidence do not apply

For an investigation, including an examination or a public inquiry, the ICAC is not bound by the rules of evidence.

58 Attendance of persons in custody

- (1) If the ICAC requires the attendance at an examination or public inquiry of a person who is in custody, the ICAC may issue a written direction for the production of the person at the time and place specified in the direction.
- (2) The direction is to be given:
 - (a) if the person is in the lawful custody of the Commissioner of Correctional Services – to the Commissioner of Correctional Services; or
 - (b) if the person is in the lawful custody of the Commissioner of Police – to the Commissioner of Police.
- (3) The direction is sufficient authority for producing the person, who must be produced accordingly.
- (4) In this section:

lawful custody:

- (a) of the Commissioner of Correctional Services, see section 9(1) of the *Correctional Services Act*; or
- (b) of the Commissioner of Police, means under arrest or otherwise in the lawful custody of a police officer.

59 Order for surrender of passport

- (1) The ICAC may apply to the Supreme Court if:
 - (a) a notice has been given to a person to attend an examination or public inquiry, whether or not the person has received the notice; and
 - (b) the ICAC believes on reasonable grounds that the person may be able to give evidence that may be relevant to the investigation to which the examination or public inquiry relates; and

- (c) the ICAC suspects on reasonable grounds that the person intends to leave Australia and has possession or control of a passport, whether Australian or foreign, issued to the person.
- (2) If satisfied by evidence on oath of the matters mentioned in subsection (1), the Supreme Court may order the person to surrender every passport, whether Australian or foreign, held by the person.
- (3) If the Supreme Court makes an order under subsection (2):
 - (a) the passport or passports must be given to the ICAC; and
 - (b) the ICAC may retain the passport or passports for the period, not exceeding 1 month, specified in the order.
- (4) The Supreme Court, on application by the ICAC, may extend for a further period or periods, not exceeding 1 month each, the period for which the ICAC may retain the passport or passports, but not so that the total period of retention exceeds 3 months.
- (5) On application by the person, the Supreme Court may at any time revoke an order under subsection (2) and, if so, the ICAC must immediately return the passport or passports to the person.
- (6) As soon as practicable after an order is made under subsection (2), extended under subsection (4) or revoked under subsection (5), the ICAC must give a copy of the order, extension or revocation to the Minister administering the *Australian Passports Act 2005* (Cth).

60 Injunction to refrain from conduct pending investigation

- (1) On application by the ICAC, the Supreme Court may grant an injunction restraining a person from engaging in conduct that is the subject of, or affects the subject matter of, an investigation or proposed investigation by the ICAC.
- (2) The Supreme Court may grant an injunction only if satisfied that:
 - (a) the conduct sought to be restrained is likely to impede the investigation or proposed investigation; or
 - (b) it is necessary in the public interest to do so.

61 Exclusion of certain injunctive remedies

An action does not lie against the ICAC:

- (a) to restrain the ICAC from commencing, or continuing to conduct, or to compel the ICAC to commence, or continue to conduct, an investigation or public inquiry; or
- (b) to restrain the ICAC from making, or to compel the ICAC to make, a referral; or
- (c) to restrain the ICAC from doing anything under Division 7, or to compel the ICAC to do something under that Division.

62 Restriction on access to ICAC premises and protected ICAC information

- (1) Despite any law of the Territory to the contrary, a public body or public officer may access ICAC premises or protected ICAC information only:
 - (a) with the ICAC's consent; or
 - (b) with a Supreme Court order made under this section.
- (2) A public body or public officer wishing to access ICAC premises or protected ICAC information may apply to the Supreme Court for an order authorising the access.
- (3) The public body or public officer must notify the ICAC of the application and the ICAC may appear and make submissions at the hearing of the application.
- (4) The Supreme Court may make an order authorising the public body or public officer to access the premises or information, subject to any conditions the Court considers appropriate, if satisfied:
 - (a) accessing the premises or information is necessary for the public body or public officer to perform official functions; and
 - (b) the benefits of the access substantially outweigh the risk of:
 - (i) prejudice to the ICAC in performing the ICAC's functions; or
 - (ii) revealing the identity of a protected person.
- (5) This section does not apply to access to ICAC premises or protected ICAC information by an authorised officer exercising a power under Part 4.

(6) In this section:

protected ICAC information means information held by the ICAC, the ICAC's Office or a member of ICAC staff in connection with, or as a result of any of the following:

- (a) an audit or review;
- (b) preliminary inquiries;
- (c) an investigation;
- (d) a report, statement or recommendation under Division 7.

Part 4 General information-gathering powers of ICAC

63 Power to enter premises of public body or public officer

An authorised officer may enter and remain on the following premises at any time for the purpose of performing functions under this Act:

- (a) premises occupied or used by a public body, other than residential premises;
- (b) premises occupied or used by a public officer for official duties, other than residential premises.

64 Power to enter other premises

- (1) An authorised officer may enter and remain on premises other than those mentioned in section 63, if the officer believes on reasonable grounds that there is anything that may be evidence of improper conduct on the premises.
- (2) The power may be exercised:
 - (a) with the consent of the owner or occupier; or
 - (b) with the authority of a search warrant.
- (3) At the reasonable request of a person apparently in charge of the premises or any other person on the premises, the authorised officer must produce the officer's identity card for inspection.

65 Search warrants

- (1) An authorised officer may apply to a justice of the peace for a search warrant if the officer believes on reasonable grounds that there is anything that may be evidence of improper conduct on the premises.
- (2) The application:
 - (a) must specify the kind of improper conduct suspected; and
 - (b) may be made:
 - (i) in person; or
 - (ii) if that is not practical – by telephone, fax or other electronic method.
- (3) The justice of the peace may issue a search warrant to the officer if satisfied by evidence on oath that there are reasonable grounds to believe that there is anything on the premises that may be evidence of improper conduct of a kind specified in the application.
- (4) A search warrant authorises an authorised officer to enter and remain on the premises specified in the warrant for the purpose of carrying out a search of the premises or persons on or about the premises.
- (5) A search warrant may authorise the exercise of the powers conferred by the warrant:
 - (a) at any time; or
 - (b) subject to limitations as to hours of the day (or night), or other limits as to the time, when the powers may be exercised.
- (6) A search warrant must specify the date on which it ceases to have effect, which must be not later than 30 days after the date on which it is issued.
- (7) A search warrant may be executed by the authorised officer to whom it is issued or by another authorised officer.
- (8) The authorised officer executing a search warrant must produce the warrant for inspection when asked by a person on the premises.

66 Obtaining warrant by telephone or other electronic method

- (1) This section applies if a justice of the peace issues a search warrant on an application under section 65(2)(b)(ii).

- (2) The justice of the peace must:
 - (a) complete and sign the warrant; and
 - (b) inform the authorised officer of its terms; and
 - (c) record on the warrant the reasons for issuing it.
- (3) The authorised officer must:
 - (a) complete in duplicate a form of warrant in the terms given under subsection (2)(b); and
 - (b) write on both copies the name of the justice of the peace and the date and time the warrant was issued; and
 - (c) send one of the copies to the justice of the peace.
- (4) On receiving the copy, the justice of the peace must:
 - (a) compare it with the warrant the justice of the peace signed; and
 - (b) if satisfied they are in substance identical, note this fact on the warrant and send the warrant and copy to the ICAC.
- (5) If the form of the warrant prepared under subsection (3)(a) is in substance identical to the warrant signed by the justice of the peace under subsection (2)(a), it has the same authority as a search warrant issued under section 65(3).

67 Entry on Aboriginal land

If it is necessary or convenient for an authorised officer to enter land to exercise a power under this Act, the officer may do so for that purpose despite:

- (a) the land being Aboriginal land as defined in section 3 of the *Aboriginal Land Act*; and
- (b) the officer not holding a permit under that Act to enter or remain on the land.

68 Powers of authorised officers while on or about premises

- (1) An authorised officer who enters premises under this Part may exercise one or more of the following powers:
 - (a) search the premises and examine anything on the premises (opening the thing by force if necessary);

- (b) take photographs, or make films or audio, video or other recordings, of anything on the premises or found on a person searched under section 70;
- (c) operate equipment or facilities on the premises;
- (d) seize anything found on the premises, or on a person searched under section 70, that the authorised officer believes on reasonable grounds may be evidence of improper conduct and retain it for as long as may be necessary for one or more of the following purposes:
 - (i) to examine it to determine its evidentiary value;
 - (ii) to copy it;
 - (iii) if it is relevant to an investigation or possible future investigation – for the investigation;
- (e) issue a notice (a **retention notice**) requiring that a thing mentioned in paragraph (d) not be moved or interfered with without the approval of an authorised officer;
- (f) if a thing mentioned in paragraph (d) cannot be conveniently moved – secure it against interference;
- (g) require a person on or about the premises to do any of the following:
 - (i) state the person's full name, date of birth and how the person may be contacted;
 - (ii) produce evidence of the person's identity;
 - (iii) answer (orally or in writing) questions asked by the authorised officer;
 - (iv) produce a thing the authorised officer believes on reasonable grounds is connected with improper conduct;
 - (v) operate equipment or facilities on the premises;
 - (vi) give the authorised officer any translation, code, password or other information necessary to gain access to, or interpret and understand, anything located or obtained by the officer in the course of exercising the officer's functions under this Part;
 - (vii) give other assistance the authorised officer reasonably requires;

- (h) give directions to a person in charge of a vehicle or vessel in relation to the stopping or movement of the vehicle or vessel.
- (2) A person to whom a requirement is made under subsection (1)(g) or a direction is given under subsection (1)(h):
 - (a) must comply with the requirement or direction to the extent the person is able to do so; and
 - (b) if asked to answer a question – must do so to the best of the person's knowledge, information and belief.

Maximum penalty: 100 penalty units.

- (3) An offence against subsection (2) is an offence of strict liability.
- (4) If an authorised officer seizes anything under this section, the officer must issue a receipt and:
 - (a) if the owner or occupier, or a person apparently responsible to the owner or occupier, is present – give the receipt to the owner, occupier or person; or
 - (b) otherwise:
 - (i) leave the receipt on the premises, or in another location agreed with the owner or occupier, in an envelope addressed to the owner or occupier; or
 - (ii) make alternative arrangements with the owner or occupier for delivery of the receipt.
- (5) While anything seized under this section remains in the ICAC's possession, the ICAC must allow the owner or occupier reasonable access to it.

69 Procedure for retention notices

- (1) A retention notice:
 - (a) must be given in writing to the owner, or person apparently in control, of the thing to which it relates; and
 - (b) must state that it is an offence to move or interfere with the thing without the approval of an authorised officer.
- (2) A person commits an offence if:
 - (a) the person intentionally engages in conduct; and

- (b) the conduct results in the contravention of a retention notice and the person has knowledge of the result.

Maximum penalty: 100 penalty units.

- (3) If the ICAC subsequently determines that a thing to which a retention notice relates should be seized, an authorised officer may:
 - (a) without warrant, enter and remain on the premises where the thing is reasonably suspected to be located, for the purpose of seizing the thing; and
 - (b) exercise any of the powers in section 68 for that purpose.

70 Search of persons

- (1) This section applies only if premises are entered under a search warrant.
- (2) An authorised officer may search a person on or about the premises whom the authorised officer suspects on reasonable grounds has on their person evidence of improper conduct.
- (3) In searching a person under this section, the authorised officer:
 - (a) may run the officer's hands over the person's outer clothing; and
 - (b) may require the person to remove a coat, jacket, hat or shoes the person is wearing, and may run the officer's hands over the person's remaining outer clothing; and
 - (c) if the officer sees or detects anything the officer suspects on reasonable grounds is, or contains, evidence of improper conduct – may require the person to surrender the thing for inspection; and
 - (d) may use reasonable force to remove a thing from a person if the person does not comply with a requirement to remove or surrender the thing under paragraph (b) or (c); and
 - (e) may inspect a thing that a person has removed or surrendered, or that has been removed from a person; and
 - (f) must conduct the search in a manner that affords, to the extent that the circumstances of the search permit, reasonable privacy to the person being searched; and
 - (g) must conduct the search as quickly as is reasonably practicable in the circumstances.

- (4) A search must be conducted by a person of the same sex as the person being searched unless it is not reasonable or practicable to do so in the circumstances of the search.

71 Power to require verification and further information from persons providing information to ICAC

- (1) For the performance of the ICAC's functions under this Act, the ICAC may, at any time, do any of the following:
- (a) require a person who has provided information to the ICAC to:
- (i) verify the information by statutory declaration; or
- (ii) answer questions, or provide further information, in relation to the information;
- (b) require a person who has made a protected communication to produce items in the person's possession or control that are relevant to the protected communication.
- (2) A requirement under subsection (1) may be made:
- (a) if an oral response to a question is required – orally; or
- (b) otherwise – by written notice.
- (3) A written notice to provide further information or produce an item may require the person to verify the further information or item by statutory declaration.
- (4) If an item is produced under this section:
- (a) the ICAC may retain possession of the item for a reasonable period and may make copies of, or take extracts from, the item; and
- (b) while the item remains in the ICAC's possession, the ICAC must allow the person reasonable access to the item.

72 Power to require information and items from public bodies and public officers

- (1) For the performance of the ICAC's functions under this Act, an authorised officer may, at any time, require a public body or public officer to:
- (a) answer specified questions or provide specified information; or
- (b) produce specified items, or items of a specified kind, in the body's or officer's possession or control.

- (2) When making a requirement under subsection (1), the authorised officer must inform the public body or public officer about the following but is not required to give any other information about the nature or purpose of the requirement:
 - (a) that the requirement is made for the purposes of the ICAC;
 - (b) if the body or officer is under investigation – that fact.
- (3) A requirement under subsection (1), and accompanying information under subsection (2), may be made:
 - (a) if an oral response to a question is required – orally; or
 - (b) otherwise – by written notice.
- (4) A written notice to provide information or produce an item may require the person to verify the information or item by statutory declaration.
- (5) If an item is produced under this section:
 - (a) the ICAC may retain possession of the item for a reasonable period and may make copies of, or take extracts from, the item; and
 - (b) while the item remains in the ICAC's possession, the ICAC must allow the public body or public officer reasonable access to the item.

73 Arrangements for access to confidential information

- (1) The ICAC may make arrangements with a public body or public officer:
 - (a) for access by the ICAC and other persons performing functions under this Act to confidential information and databases; and
 - (b) for appropriate protection of the confidentiality of information accessed.
- (2) A public body or public officer may allow access to information and databases in accordance with an arrangement under subsection (1) despite any obligation of non-disclosure.

74 Power to direct public body or public officer to refrain from action

- (1) The ICAC may, by written notice, require a public body or public officer to refrain from taking action specified in the notice if the ICAC believes on reasonable grounds that taking the action would, or would be likely to, obstruct the ICAC performing functions under this Act or prejudice a future investigation.
- (2) A public body or public officer commits an offence if:
 - (a) the public body or public officer intentionally engages in conduct; and
 - (b) the conduct results in a contravention of a requirement in a notice given to the body or officer under subsection (1) and the public body or public officer has knowledge of the result.

Maximum penalty: 400 penalty units or imprisonment for 2 years.

Part 5 Matters of confidentiality and privilege

Division 1 Application of confidentiality and privilege

75 Definitions

In this Division:

closed session means a part of a public inquiry not open to the public.

open session means a part of a public inquiry open to the public.

representation, see the Dictionary to the *Evidence (National Uniform Legislation) Act*.

76 Confidential or privileged information

- (1) Subject to this Act:
 - (a) no obligation of secrecy or confidentiality or other restriction on disclosing information (imposed by a law of the Territory or otherwise) applies to the giving of evidence; and
 - (b) no privilege exists to protect the refusal or failure to give evidence on grounds of public interest immunity; and

- (c) no privilege exists in favour of the Territory or a public body to protect the refusal or failure to give evidence on grounds of client legal privilege.

Note for subsection (1)(c)

Client legal privilege for individuals is dealt with in section 77.

- (2) However, a person is not authorised or required by this Act:
- (a) to disclose information contrary to section 38 of the *Northern Territory Aboriginal Sacred Sites Act*; or
 - (b) to disclose confidential information about the decisions, proceedings or deliberations of:
 - (i) the Executive Council or a committee of the Executive Council; or
 - (ii) the Cabinet or a committee of the Cabinet; or
 - (c) to disclose confidential information about communications among members of the Executive Council or Cabinet or among Australian governments; or
 - (d) to produce a document or to disclose information about a document that is exempt under section 45(1)(a) of the *Information Act*.
- (3) If, but for subsection (1)(c), the Territory or a public body could claim privilege in relation to information, the ICAC must not make the information available to the public, in a report or otherwise, except to the extent the ICAC considers necessary to explain or support a finding of improper conduct the ICAC has made public.

77 Client legal privilege

A witness has a reasonable excuse for refusing or failing to give evidence if the evidence:

- (a) relates to conduct of the witness or another individual; and
- (b) is protected by client legal privilege.

78 Privilege against self-incrimination

- (1) Except as provided by subsection (2) or (3), a witness is not entitled to refuse or fail to give evidence on the ground that the evidence might tend to incriminate the witness or make the witness liable to a penalty.

- (2) If a witness is currently charged with, or facing criminal proceedings for, an offence:
 - (a) the witness is entitled to refuse or fail to give evidence on the ground that the evidence might tend to incriminate the witness in relation to the offence; and
 - (b) the ICAC must inform the witness of that entitlement:
 - (i) before the witness is asked a question, or gives information or produces an item, at an examination or public inquiry; or
 - (ii) otherwise – before the witness is asked a question, or gives information or produces an item, that could reasonably be expected to elicit a representation that might tend to incriminate the witness in relation to the offence.
- (3) A witness at an open session is also entitled to refuse or fail to give evidence on the ground that the evidence might tend to incriminate the witness in relation to an offence that, in the ICAC's opinion, is not materially relevant to the alleged improper conduct that is the subject of the public inquiry.
- (4) For a public inquiry, the ICAC must hear submissions about the applicability of subsection (2) or (3) in a closed session if the witness requests.

79 Subsequent use of representations made by witness

- (1) A representation made by a witness in evidence given to the ICAC or an authorised officer is not admissible in evidence against the witness in a civil, criminal or disciplinary proceeding except a proceeding for an offence against this Act.
- (2) Subsection (1) does not apply to an item given in evidence to the ICAC or an authorised officer:
 - (a) if the item did not come into existence as part of giving evidence to the ICAC or an authorised officer, as long as the item is not relied on to prove that a representation was made in evidence given to the ICAC or an authorised officer; or

- (b) if, before the person gave the item in evidence, the ICAC or authorised officer informed the person that the person was not obliged to give the item in evidence, but that if the person did so, the item could be used against them in evidence in civil, criminal or disciplinary proceedings.

Example for subsection (2)(a)

Copies of business records produced at an examination or public inquiry by a witness may be admissible in subsequent proceedings if they are led as evidence of the activities of the business rather than as evidence that they were produced by the witness in giving evidence to the ICAC.

- (3) Subsection (2)(a) applies to a copy of an item as if it were the original item.
- (4) Subject to subsection (5), subsection (1) does not prevent the use of a representation made by a witness, or evidence given to the ICAC or an authorised officer by the witness, to locate or identify further evidence which may be used in civil, criminal or disciplinary proceedings.
- (5) The ICAC must not disclose to a person or body (other than a member of ICAC staff), or seek to elicit or use during an open session, evidence given by the witness at an examination or closed session that tends to incriminate the witness only in relation to a summary offence.
- (6) Subsection (5) does not apply to evidence in relation to:
- (a) an offence that involves improper conduct; or
 - (b) an offence the ICAC believes on reasonable grounds raises concerns about a serious ongoing or future threat to a person's health or safety, to public health or to the environment.

80 Parliamentary privilege

- (1) Except as provided expressly or by necessary implication, this Act does not limit the privileges, immunities and powers of the Legislative Assembly.
- (2) The following things do not amount to a breach of parliamentary privilege:
- (a) an allegation that an MLA has engaged or is engaging in improper conduct;

- (b) conducting an investigation into 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) making findings in relation to an allegation mentioned in paragraph (a) that are not based on material the subject of parliamentary privilege.

Division 2 Dealing with privilege claims

81 Definitions

In this Division:

claimant means a person who is entitled to claim that an item is the subject of privilege or, in the case of parliamentary privilege, means the Legislative Assembly.

claimant's representative, for a claimant, means:

- (a) a person nominated by the claimant; or
- (b) in the case of the Legislative Assembly:
 - (i) a person nominated by the Legislative Assembly; or
 - (ii) in the absence of a nomination – the Clerk.

Clerk means Clerk of the Legislative Assembly.

proper officer, in relation to the performance of a function under this Division, means an officer of the Supreme Court appointed by a Supreme Court Judge for that purpose.

secured item means an item sealed in an envelope, or otherwise secured, under section 85(2)(b).

82 Meaning of *subject of privilege*

An item is the **subject of privilege** if it is, or contains information that is:

- (a) information or a document mentioned in section 76(2); or
- (b) the subject of client legal privilege, as provided for in section 77; or
- (c) the subject of the privilege against self-incrimination, as provided for in section 78; or

- (d) the subject of parliamentary privilege, as provided for in section 80.

83 Notice of potentially privileged material

- (1) An authorised officer who intends to inspect or view an item the officer considers likely to be the subject of privilege (other than parliamentary privilege) must give reasonable notice to the apparent claimant of the officer's intention.
- (2) Subsection (1) does not prevent the authorised officer from:
- (a) seizing or copying an item without viewing any part of it likely to be the subject of privilege; or
- (b) inspecting or viewing an item using a method reasonably designed to avoid viewing any part of it likely to be the subject of privilege.
- (3) An authorised officer who intends to inspect, copy or seize an item, or require a person searched to surrender an item, the officer considers likely to be the subject of parliamentary privilege must give reasonable notice to the Clerk of the officer's intention.

84 Process for dealing with claim of parliamentary privilege

- (1) If a memorandum is in effect, an authorised officer must act in accordance with it in relation to a claim that an item the officer wishes to inspect, copy or seize, or require a person searched to surrender, is the subject of parliamentary privilege.
- (2) If the matter cannot be resolved in accordance with the memorandum, or if there is no memorandum in effect, the authorised officer must deal with the item in accordance with section 85.
- (3) In this section:

memorandum means a memorandum of understanding between the Legislative Assembly and the ICAC in relation to parliamentary privilege.

85 Privilege claims generally

- (1) This section applies:
 - (a) if, for privilege other than parliamentary privilege:
 - (i) an authorised officer wishes to inspect, copy or seize an item or require a person searched to surrender an item; and
 - (ii) a claimant or claimant's representative claims the item is the subject of privilege; or
 - (b) as mentioned in section 84(2).
- (2) The authorised officer must consider the claim of privilege and either:
 - (a) cease exercising the power in relation to the item over which the claim of privilege is made; or
 - (b) if the authorised officer believes on reasonable grounds the item may not be the subject of privilege – require the claimant or claimant's representative to immediately seal the item in an envelope, or otherwise secure the item if it cannot be sealed in an envelope, and give the secured item to the officer.
- (3) The authorised officer must not inspect the item in considering the claim of privilege but may copy the item if it is in electronic form as long as copying the item does not disclose any part of the item that may be privileged to the officer or another person not entitled to view that part of the item.
- (4) If the authorised officer requires the claimant to give the secured item to the officer under subsection (2)(b), the officer must:
 - (a) notify the ICAC as soon as reasonably practicable; and
 - (b) as soon as reasonably practicable, give the secured item to the proper officer to be held in safe custody.
- (5) Subject to section 87, a person must not open a sealed envelope, or otherwise interfere with a secured item, before delivery to the proper officer.
- (6) Despite subsection (2)(b), the authorised officer must not require the claimant to give the secured item to the officer under that subsection unless the officer gives the claimant or claimant's representative a reasonable opportunity to accompany the officer in giving the item to the proper officer.

86 Application to Supreme Court to determine privilege

- (1) Within 7 days after a secured item is given to the proper officer under section 85, an application to the Supreme Court to determine whether or not the item is the subject of privilege may be made by:
 - (a) for privilege other than parliamentary privilege – the claimant or claimant's representative; or
 - (b) for parliamentary privilege – the ICAC.
- (2) If an application is not made within 7 days, the proper officer must give the item:
 - (a) for privilege other than parliamentary privilege – to the ICAC; or
 - (b) for parliamentary privilege – to the Clerk.
- (3) Within a reasonable time before the hearing of the application:
 - (a) for privilege other than parliamentary privilege – the claimant or claimant's representative must notify the ICAC of the application; or
 - (b) for parliamentary privilege – the ICAC must notify the Clerk of the application.
- (4) The ICAC is entitled to appear and be heard on the hearing of an application.
- (5) The Clerk is entitled to appear and be heard on the hearing of an application relating to parliamentary privilege.
- (6) If the proper officer gives an item to the ICAC under subsection (2)(a):
 - (a) the claimant is taken to have authorised the ICAC to view the item; and
 - (b) the claimant is not to be taken to have waived privilege for any other purpose.

87 Determination of privilege claim

- (1) On an application under section 86, the Supreme Court is to determine whether or not the item is the subject of privilege in whole or part.

- (2) For making a determination, the Judge constituting the Supreme Court and any other person authorised by the Court may:
 - (a) open the sealed envelope or otherwise access the item; and
 - (b) inspect the item.
- (3) If the Supreme Court determines that the whole of the item is the subject of privilege, the Court must order that the item be returned to the claimant or claimant's representative.
- (4) If the Supreme Court determines that the whole of the item is not the subject of privilege the Court must order that the item be given to the ICAC.
- (5) If the Supreme Court determines that part of the item is the subject of privilege (the **privileged part**) and part is not (the **non-privileged part**):
 - (a) if the item is able to be divided into the privileged part and the non-privileged part – the Court must divide the item and order that the privileged part be returned to the claimant or claimant's representative and the non-privileged part be given to the ICAC; or
 - (b) if paragraph (a) does not apply but the Court considers it possible to produce a copy of the item from which the privileged part has been removed:
 - (i) the Court must make orders the Court considers appropriate for production of the copy; and
 - (ii) the Court must order that the copy be given to the ICAC and the item to be returned to the claimant or claimant's representative; or
 - (c) otherwise – the Court must order that the item be returned to the claimant or claimant's representative.
- (6) Except as provided in subsection (2), a person must not open a sealed envelope containing the item, or otherwise have access to the item, before:
 - (a) the Supreme Court determines the claim of privilege; or
 - (b) the item is returned to the claimant.
- (7) A person commits an offence if:
 - (a) the person intentionally engages in conduct; and

- (b) the conduct results in a contravention of subsection (6) and the person is reckless in relation to the result.

Maximum penalty: 100 penalty units or imprisonment for 12 months.

Part 6 Whistleblower protection

Division 1 Important principles and concepts

88 Whistleblower protection principles

- (1) It is intended that this Act be administered according to the following principles:
- (a) public bodies have the primary responsibility for providing protected persons with protection and support;
 - (b) the ICAC's role is to provide guidance as to how public bodies can fulfil this responsibility and to take action if the ICAC considers a public body is not fulfilling its responsibility;
 - (c) wherever possible, the identity of a protected person should be kept confidential, as anonymity is the best protection of a person from retaliation;
 - (d) the principle that public bodies of the Territory are, and are to act as, model litigants in proceedings, including disciplinary proceedings.
- (2) This section does not create any legal rights in any person or give rise to any civil cause of action.

89 Meaning of *protected action*

- (1) A person takes ***protected action*** if:
- (a) the person, being an individual, makes a protected communication; or
 - (b) the person (whether or not an individual) takes another action in the course of, or for the purpose of:
 - (i) complying with this Act; or
 - (ii) cooperating with a person or body performing functions under this Act.

- (2) Despite subsection (1), an action is not protected action to the extent the action involves the provision or communication of information the person taking the action knows or believes is misleading information.

90 Meaning of *protected communication*

- (1) A ***protected communication*** is:
- (a) information in a report made by an individual to the ICAC in accordance with directions or guidelines under section 20; or
 - (b) information mentioned in subsection (2) that is provided by an individual to any of the following:
 - (i) the ICAC or the ICAC's Office;
 - (ii) the Ombudsman or the Ombudsman's Office;
 - (iii) the Auditor-General or the Auditor-General's Office;
 - (iv) the Health and Community Complaints Commissioner or a staff member of the Commissioner;
 - (v) the Children's Commissioner;
 - (vi) the Environment Protection Authority;
 - (vii) if the information relates to the ICAC, the ICAC's Office or a member of ICAC staff – the Inspector or a member of Inspector staff;
 - (viii) if the information relates to a police officer – the Commissioner of Police;
 - (ix) if the information relates to an MLA other than the Speaker, including a minister – the Speaker;
 - (x) if the information relates to the Speaker – the Deputy Speaker;
 - (xi) if the information relates to the Chief Justice – the next senior Supreme Court Judge;
 - (xii) if the information relates to a Supreme Court Judge other than the Chief Justice or to the Chief Judge – the Chief Justice;
 - (xiii) if the information relates to a Local Court Judge other than the Chief Judge – the Chief Judge;

- (xiv) if the information relates to a contravention of the *Electoral Act* – the Electoral Commissioner;
 - (xv) if the information relates to an employee or officer of a public body – the entity with responsibility for the management and control of the public body or a nominated recipient for the public body; or
 - (c) an action declared under section 91 to be a protected communication.
- (2) For subsection (1)(b), the information is information the individual believes on reasonable grounds:
- (a) would tend to show that improper conduct has occurred, is occurring or is at risk of occurring; or
 - (b) would assist the ICAC to perform the ICAC's functions; or
 - (c) would otherwise assist in the administration, or achieving the objects, of this Act.
- (3) It is irrespective:
- (a) whether a protected communication is made orally or in writing; and
 - (b) whether or not a protected communication is made anonymously; and
 - (c) whether or not the individual making a protected communication asserts it is a protected communication.
- (4) For a protected communication mentioned in subsection (1)(a), subsection (3) is subject to any contrary provision in the directions or guidelines under section 20.
- (5) In this section:
- staff member**, in relation to the Health and Community Complaints Commissioner, see section 4(1) of the *Health and Community Services Complaints Act*.

91 Declaration of protected communication

- (1) An individual may apply to the ICAC for a declaration that an action taken by the individual that involves an allegation of improper conduct is a protected communication.

- (2) The ICAC may, by written notice to the applicant, declare the action to be a protected communication, whether or not the action would otherwise be a protected communication.
- (3) In determining whether to declare an action to be a protected communication, the ICAC must take into account the following matters:
 - (a) the seriousness of the improper conduct alleged;
 - (b) whether the applicant believed, and had reasonable grounds for believing, the information alleged was reliable;
 - (c) whether the action was consistent with the processes and practices of a public body;
 - (d) whether the applicant believed, and had reasonable grounds for believing, the entity to which the allegation was made had statutory responsibility for dealing with improper conduct of the kind alleged;
 - (e) whether an alternative process for reporting improper conduct was available and the applicant ought reasonably have used that process instead of taking the action;
 - (f) whether the applicant believed, and had reasonable grounds for believing, the applicant was following any requirements for making a protected communication;
 - (g) the extent to which the applicant believed that taking the action would genuinely assist in preventing, reducing or dealing with improper conduct;
 - (h) whether taking the action was a reasonable preparatory step to, or reasonable part of, taking another action that is protected action;
 - (i) the actual and potential adverse impact on the public interest or the interests of any person caused by the action;
 - (j) whether taking the action was reasonable in all the circumstances.
- (4) An applicant or the ICAC may give a copy of a notice under subsection (2) to any person or body.

- (5) In addition, the ICAC may direct a public body to ensure that the content of a notice under subsection (2) is brought to the attention of:
 - (a) any persons specified by the ICAC; and
 - (b) any other person who may be in a position to engage in retaliation for the action to which the notice relates or to prevent or deal with retaliation.
- (6) The rules of natural justice (including any duty of procedural fairness) do not apply to the ICAC in determining whether to declare an action to be a protected communication to the extent complying with those rules would be likely to:
 - (a) reveal the identity of a protected person or otherwise put a protected person at increased risk of retaliation; or
 - (b) involve a risk that the individual who took the action would suffer retaliation before the declaration is made.
- (7) The ICAC may, by written notice to an individual, vary or revoke a notice under subsection (2) if, as a result of further information, the ICAC considers the action taken or part of the action taken ought not be a protected communication.
- (8) Variation or revocation of the declaration does not affect the status of the protected communication if it would be a protected communication even if the declaration had not been made.

92 **Meaning of *engage in retaliation***

- (1) A person ***engages in retaliation*** against another person (the ***victim***) if the person causes, or threatens to cause, harm to the victim:
 - (a) with the intention of discouraging the victim or a third person from taking protected action; or
 - (b) with the intention of discouraging the victim or a third person from supporting a protected person; or
 - (c) because of protected action taken, or suspected by the person to have been taken, by the victim; or
 - (d) because of action taken, or suspected by the person to have been taken, by the victim to support a protected person.
- (2) An intention or reason mentioned in subsection (1)(a) to (d) is a ***prohibited reason***.

- (3) It is irrelevant whether or not the victim is a protected person.
- (4) In this section:
support includes assist and encourage.

Division 2 Responsibilities relating to protected communications

93 ICAC to issue directions and guidelines for dealing with voluntary protected communications

- (1) The ICAC must issue directions and guidelines governing how a recipient of a voluntary protected communication is to deal with the communication.
- (2) The directions and guidelines may:
 - (a) require the recipient to report the communication to the ICAC to the extent it involves suspected improper conduct involving corrupt conduct, anti-democratic conduct or retaliation; and
 - (b) encourage the recipient to report the communication to the ICAC to the extent it involves other suspected improper conduct; and
 - (c) require the recipient to take action to minimise the risk of retaliation in relation to the communication.
- (3) The directions and guidelines may be included as part of directions and guidelines under section 20 or issued separately.
- (4) In this section:

voluntary protected communication means a protected communication made otherwise than in compliance with a direction under section 20 to report suspected improper conduct.

94 Nominated recipient

- (1) The person responsible for the management or control of a public body may nominate an eligible person to be the **nominated recipient** for the public body for this Part.
- (2) A person is eligible for nomination if:
 - (a) the person is a public officer; and

- (b) the person responsible for the management or control of a public body is satisfied the person has suitable skills and training to be the nominated recipient.
- (3) A nomination:
 - (a) must be in writing; and
 - (b) must specify the period for which the nomination has effect.
- (4) The same person may be appointed as nominated recipient for more than one public body.
- (5) The person responsible for the management or control of a public body must notify the ICAC of a nomination, the expiry of a nomination or the revocation of a nomination as soon as practicable after the nomination is made, expires or is revoked.
- (6) Notice of a nomination must include the name and contact details of the nominated recipient and the period of the nomination.

95 Information to be given to protected person

- (1) As soon as practicable after receiving a protected communication, the recipient must give the person who made the communication a written notice setting out:
 - (a) a statement that the communication has been received; and
 - (b) the date of receipt; and
 - (c) an indication of the content of the communication; and
 - (d) a statement that the communication is a protected communication; and
 - (e) information about the ICAC's role and contact details for the ICAC's Office.
- (2) Subsection (1) does not apply if, despite making efforts that are reasonable in the circumstances, the recipient is unable to contact the person who made the protected communication.

Example for subsection (2)

It may not be possible to contact a person who made a protected communication anonymously.

- (3) In addition to the notice required by subsection (1), the recipient must make reasonable efforts to inform the person who made the protected communication of the matters specified in Schedule 2.

- (4) For a protected communication made to the person responsible for the management or control of a public body, the person's obligations under this section may be fulfilled by the nominated recipient for the public body.
- (5) This section does not apply in relation to a communication that is a protected communication only because it is the subject of a declaration under section 91(2).

Division 3 Protection from liability

96 Protection from liability – taking protected action

- (1) A protected person:
 - (a) incurs no civil or criminal liability by taking protected action; and
 - (b) does not become liable to disciplinary action, or other adverse administrative action, for taking protected action.
- (2) In an action for defamation, protected action is absolutely privileged.
- (3) Subsections (1) and (2) apply even if the protected action is taken in breach of an obligation of confidentiality.
- (4) Despite anything to the contrary in this Part, when a person takes protected action, the person's liability for the person's own conduct (other than conduct consisting of taking the protected action) is not affected.

Division 4 Protection from retaliation

97 Offence to engage in retaliation

- (1) A person commits an offence if:
 - (a) the person intentionally engages in conduct; and
 - (b) the conduct is retaliation and the person is reckless in relation to that circumstance.

Maximum penalty: 400 penalty units or imprisonment for 2 years.

- (2) For subsection (1), if the retaliation consists of a threat to cause harm:
 - (a) the prosecution must prove that the person:
 - (i) intended the victim to fear the threat would be carried out; or
 - (ii) was reckless as to the victim fearing the threat would be carried out; but
 - (b) it is not necessary to prove that the victim actually feared the threat would be carried out.
- (3) In a prosecution for an offence against subsection (1) consisting of conduct mentioned in section 92(1)(a) or (b), it is not necessary to prove that the victim or third person was actually discouraged from taking protected action or providing support.
- (4) It is a defence to a prosecution for an offence against subsection (1) if:
 - (a) the defendant's conduct was otherwise legal and was taken substantially for a reason other than a prohibited reason; or
 - (b) the defendant believed on reasonable grounds the information provided by the protected person that led to the defendant's conduct was false or misleading.
- (5) A prosecution for an offence against subsection (1) must be started within 2 years after the offence is alleged to have been committed.

98 Offence to engage in retaliation in the course of management

- (1) A person (**person A**) commits an offence if:
 - (a) person A is a public officer; and
 - (b) person A intentionally engages in conduct; and
 - (c) the conduct is retaliation against another person (**person B**) and person A is reckless in relation to that circumstance; and
 - (d) person B is a person under the management, supervision or control of person A in person A's capacity as a public officer; and
 - (e) the retaliation is engaged in in circumstances connected to person A's management, supervision or control of person B; and

(f) person A has knowledge of the circumstances mentioned in paragraphs (d) and (e).

Maximum penalty: 400 penalty units or imprisonment for 2 years.

- (2) Strict liability applies to subsection (1)(a).
- (3) For subsection (1), if the retaliation consists of a threat to cause harm:
- (a) the prosecution must prove that person A:
- (i) intended person B to fear the threat would be carried out; or
- (ii) was reckless as to person B fearing the threat would be carried out; but
- (b) it is not necessary to prove that person B actually feared the threat would be carried out.
- (4) In a prosecution for an offence against subsection (1) consisting of conduct mentioned in section 92(1)(a) or (b), it is not necessary to prove that person B or a third person was actually discouraged from taking protected action or providing support.
- (5) It is a defence to a prosecution for an offence against subsection (1) if:
- (a) person A's conduct was otherwise legal and was taken substantially for a reason other than a prohibited reason; or
- (b) person A believed that the conduct was a reasonable way of carrying out person A's role and responsibilities as a public officer; or
- (c) person A believed on reasonable grounds the information provided by the protected person that led to the conduct was false or misleading.
- (6) Person A has a legal burden of proof in relation to the matters mentioned in subsection (5).
- (7) A prosecution for an offence against subsection (1) must be started within 12 months after the offence is alleged to have been committed.

99 Compensation for retaliation

- (1) A person who engages in retaliation is liable to pay an amount to the victim as compensation for the retaliation.
- (2) Compensation may be recovered:
 - (a) as for damages for a tort in a court of competent jurisdiction; or
 - (b) if within the small claims jurisdiction of the Tribunal – as a small claim in the Tribunal.
- (3) A court or the Tribunal may award an amount in the nature of exemplary damages in proceedings under this section.
- (4) In determining proceedings for compensation for retaliation, the court or Tribunal must take into account:
 - (a) the reasonableness of the conduct of each party in the circumstances leading to the retaliation and the circumstances of the retaliation; and
 - (b) any conduct of a party that contributed to, or mitigated, the harm caused by the retaliation.
- (5) Proceedings for compensation for retaliation does not preclude other forms of relief.
- (6) A victim may bring proceedings under this section even if the defendant has not been, or cannot be, prosecuted for an offence against section 97 in relation to the retaliation.
- (7) In this section:

small claims jurisdiction, see section 3 of the *Small Claims Act*.

100 Injunctive remedies for retaliation

- (1) The Supreme Court may grant injunctive remedies for retaliation as follows:
 - (a) the Court may grant a mandatory injunction requiring a person who has engaged in retaliation to take specified action to remedy any harm suffered by the victim;
 - (b) the Court may grant an injunction to prevent a person engaging in retaliation.

- (2) An application may be made for an injunctive remedy under this section by:
 - (a) the ICAC; or
 - (b) the victim or prospective victim of the retaliation or apprehended retaliation.
- (3) In an appropriate case, the Supreme Court may make an order in the nature of an interim injunction under this section.

101 Facilitating access to justice for victims of retaliation

- (1) This section applies to:
 - (a) proceedings for compensation under section 99; or
 - (b) proceedings for an injunctive remedy under section 100.
- (2) The court or Tribunal hearing the proceedings must consider, taking into account the matters mentioned in subsection (3), whether to exercise a power of the court or Tribunal:
 - (a) to hold the proceedings in private; and
 - (b) to prohibit the publication of evidence or information that may identify the victim or prospective victim.
- (3) The matters the court or Tribunal must take into account are:
 - (a) the extent to which the identity of the victim or prospective victim is known; and
 - (b) the increased risk of harm to the victim or prospective victim if their identity were more widely known as a result of the proceedings.
- (4) In addition to any other order the court or Tribunal may make, it may order that an apology be made, publicly or in private, to the victim or prospective victim, if the court or Tribunal considers an apology may assist to mitigate harm or prevent future harm to the victim or prospective victim.
- (5) For proceedings in a court, the court may award costs against the victim or prospective victim only if satisfied:
 - (a) the victim or prospective victim issued the proceedings vexatiously or without reasonable cause; or

- (b) the victim or prospective victim's unreasonable conduct caused another party to incur the costs.

Note for subsection (5)

For costs in proceedings in the Tribunal see Part 4, Division 6 of the Tribunal Act.

102 Vicarious liability for retaliation

- (1) If an employee of a public body engages in retaliation in the course of employment, both the employee and the public body are jointly and severally liable for the retaliation and proceedings may be taken under section 99 against either or both.
- (2) Subsection (1) does not apply if the public body proves that it took all reasonable steps to prevent the employee from doing the act referred to in that subsection.
- (3) For the purposes of subsection (2) and without limiting the matters that may be taken into account in determining whether the public body has taken all reasonable steps, the following matters are to be considered:
 - (a) the provision by the public body of training aimed at preventing or decreasing retaliation;
 - (b) the development and implementation by the public body of policies aimed at preventing or decreasing retaliation;
 - (d) the financial circumstances of the public body;
 - (e) the number of employees of the public body.
- (4) If a court or the Tribunal finds that a public body is liable under subsection (1) for retaliation, the court or Tribunal must, before making an order for compensation:
 - (a) consider the extent of steps taken by the public body to prevent the retaliation; and
 - (b) take those steps into account in determining the proportion of the amount to be paid as compensation by the public body.

103 Guidelines to minimise retaliation

- (1) The ICAC must issue, and keep under review, guidelines for public bodies and public officers concerning frameworks and practices for minimising risks of retaliation.

- (2) Without limiting subsection (1), the guidelines may include measures for:
- (a) education and training; and
 - (b) policies and processes; and
 - (c) allocating responsibility and resources; and
 - (d) creating a suitable organisational culture; and
 - (e) managing situations in which persons are, or are likely to be, at risk of retaliation.
- (3) The ICAC must issue the guidelines within 12 months after the commencement of this section.

104 Direction regarding action to protect persons from retaliation

- (1) Subject to subsection (2), the ICAC may give a written direction to a public body or public officer to do any of the following:
- (a) arrange for a public officer to be offered an opportunity to relocate to a suitable role in a different work unit or location;
 - (b) manage any risks that a particular person, or persons of a particular group, will be the subject of retaliation;
 - (c) take any other action or refrain from taking any action.

Note for subsection (1)

Section 146 creates an offence for contravening a direction under this section.

- (2) The ICAC may give a direction under this section only if satisfied that:
- (a) the direction would:
 - (i) assist in reducing the risk of retaliation; or
 - (ii) assist in mitigating harm suffered as a result of retaliation or preventing harm as a result of possible future retaliation; and
 - (b) it is reasonable in all the circumstances to give the direction, taking into account the nature and resources of the public body or public officer.

- (3) Subject to subsection (4), before giving a direction under this section to a public body or public officer, the ICAC:
- (a) must consult:
 - (i) for a public body – the person responsible for the management or control of a public body; or
 - (ii) for a public officer – the public officer; and
 - (b) may consult the Commissioner for Public Employment.
- (4) Subsection (3) does not apply to the extent that complying with that subsection would be likely to:
- (a) reveal the identity of a protected person or otherwise put a protected person at increased risk of retaliation; or
 - (b) involve a risk that a person would suffer retaliation before the direction is given.
- (5) The ICAC may give a direction under this section to an independent public body or public officer only if the ICAC believes on reasonable grounds the direction will have no more than a minimal negative impact on the body or officer taking into account their nature and resources.
- (6) The ICAC may, in writing, vary or revoke a direction under this section if, as a result of further information, the ICAC considers the direction is no longer appropriate.
- (7) In this section:
- independent public body or public officer*** means:
- (a) a public body that does not represent the Territory or is not otherwise controlled by the Territory or by another public body that represents the Territory; or
 - (b) a public officer:
 - (i) who does not represent the Territory; or
 - (ii) who is a member, officer or employee of a public body mentioned in paragraph (a).

105 Supreme Court may vary or revoke direction

- (1) At any time, a public body or public officer may apply to the Supreme Court to vary or revoke a direction given to the body or officer under section 104.

- (2) On an application, the Supreme Court may, by order, do any of the following if satisfied as mentioned in subsection (3):
 - (a) vary the direction;
 - (b) revoke the direction;
 - (c) revoke the direction and substitute a direction the ICAC could have given under section 104.
- (3) The Supreme Court must be satisfied that:
 - (a) non-compliance with the direction is urgently required to take action to prevent substantial harm to a person or to essential public interests; or
 - (b) both of the following apply:
 - (i) non-compliance with the direction is reasonable to perform the essential functions of the public body or public officer;
 - (ii) the public body or public officer has taken reasonable steps to minimise the risk of retaliation to a person or to protect a person who may be at risk of retaliation.
- (4) If the Supreme Court substitutes a direction under subsection (2)(c), the new direction is taken to be a direction by the ICAC under section 104.

106 Parties and procedure

- (1) This section applies for proceedings for an order under section 105.
- (2) The parties to the proceedings are:
 - (a) the applicant; and
 - (b) a protected person, or other person who may be at risk of retaliation, who may be affected by the variation or revocation of the direction to which the proceedings relate; and
 - (c) the ICAC; and
 - (d) if the Commissioner for Public Employment applies to be joined – the Commissioner for Public Employment.
- (3) The Supreme Court must consider, taking into account the matters mentioned in subsection (4), whether to exercise a power:
 - (a) to hold the proceedings in private; and

- (b) to prohibiting the publication of evidence or information that may identify a protected person or other person who may be at risk of retaliation.
- (4) The matters the Supreme Court must take into account are:
 - (a) the extent to which the identity of a protected person, or other person who may be at risk of retaliation, is known; and
 - (b) the increased risk of harm to a protected person, or other person who may be at risk of retaliation, if their identity were more widely known as a result of the proceedings.
- (5) In addition to subsection (3), the Supreme Court may hear evidence from a party in private, and without disclosing the evidence to another party, if the Court is satisfied that this is necessary:
 - (a) to keep the identity of a protected person, or other person who may be at risk of retaliation, confidential; or
 - (b) to protect the confidentiality of a current or possible future investigation by the ICAC.
- (6) If the Supreme Court is considering hearing evidence from a party in private without disclosing it to another party, the Court may:
 - (a) notify the Inspector; and
 - (b) require any material relevant to the proceedings to be made available to the Inspector; and
 - (c) permit the Inspector to appear in the proceedings and, for the purpose of testing the appropriateness or validity of the direction the subject of the proceedings:
 - (i) ask a witness questions; and
 - (ii) make submissions.
- (7) The Supreme Court may permit the Inspector to ask questions or make submissions under subsection (6)(c) in the absence of a party or a party's legal representative even if the party's interests may be affected by the subject matter of the questions or submissions.
- (8) The Supreme Court may award costs against a party who is a protected person, or other person who may be at risk of retaliation, only if satisfied:
 - (a) the party issued the proceedings vexatiously or without reasonable cause; or

- (b) the party's unreasonable conduct caused another party to incur the costs.

Division 5 ICAC oversight and further protection

107 Audits and reviews

- (1) The ICAC may, at any time, audit or review a public body to determine:
 - (a) whether the public body is complying, or has complied, with directions and is adhering, or has adhered, to guidelines under this Part; or
 - (b) whether a particular person, or persons in a particular group, are at risk of retaliation.
- (2) Despite subsection (1), the ICAC cannot audit or review a court or judicial officer in relation to the performance of judicial functions.
- (3) For an audit or review, the ICAC may exercise the powers set out in Part 4.

108 Recommendations

- (1) The ICAC may, at any time, make recommendations to a public body for:
 - (a) the improved compliance with directions, or improved adherence to guidelines, under this Part; or
 - (b) the improved management of risks of retaliation.
- (2) Sections 54 and 55 apply to recommendations made under this section as if they were recommendations made under section 53.

109 ICAC may arrange protection and require police assistance

- (1) This section applies if the ICAC considers that a person is at risk of intimidation, harassment or harm because the person:
 - (a) is a protected person; or
 - (b) is suspected of being a protected person; or
 - (c) is connected with a person who is a protected person or suspected of being a protected person.

- (2) The ICAC may take any action the ICAC considers necessary or desirable for the protection of the person, including:
- (a) directing the Commissioner of Police to:
 - (i) provide protection to the person; or
 - (ii) assist the ICAC to provide protection to the person; or
 - (iii) provide personnel or facilities to the ICAC for the provision of protection to the person; or
 - (b) making arrangements with another person or body to provide protection to the person.
- (3) Despite subsection (2)(a), the ICAC cannot direct the Commissioner of Police to provide protection by including a person in the TWPP.

Note for subsection (3)

Under section 8(1) of the Witness Protection (Northern Territory) Act the Commissioner of Police has the sole responsibility of deciding whether to include a person in the TWPP.

- (4) In this section:

harm, see section 1A of the Criminal Code.

TWPP, see section 3(1) of the *Witness Protection (Northern Territory) Act*.

Part 7 Administration and enforcement

Division 1 Appointment of ICAC and related matters

110 Appointment of ICAC

- (1) The Administrator may appoint an eligible person to be the ICAC.
- (2) The appointment may be made only after receiving a recommendation of the Legislative Assembly.
- (3) The ICAC Minister must table a copy of the appointment in the Legislative Assembly within 6 sitting days after the appointment is made.

111 Eligibility for appointment

- (1) A person is an **eligible person** for appointment as the ICAC if:
 - (a) the person is:
 - (i) a former judge of a superior Court; or
 - (ii) a lawyer who has been admitted to the legal profession for at least 10 years; and
 - (b) the person is not:
 - (i) a judicial officer; or
 - (ii) a member of an Australian parliament; or
 - (iii) a member of a local government council or of an equivalent body in a State or another Territory; or
 - (iv) a member of a political party; and
 - (c) the person does not have a recent political affiliation; and
 - (d) the person is not, and has not been during the previous 2 years, an Acting ICAC appointed under section 118(2).
- (2) For subsection (1)(c), a person has a **recent political affiliation** if, at any time during the previous 5 years, the person:
 - (a) was a member of the Legislative Assembly or a local government council; or
 - (b) was an office holder or elected representative of a political party in the Territory or elsewhere in Australia; or
 - (c) was a member of staff of a minister; or
 - (d) made a reportable donation to a political party, or an associated entity of a political party, in the Territory or elsewhere in Australia.
- (3) For subsection (2)(d), a person made a reportable donation if it was made by the person or by a body corporate of which the person was an office holder or majority shareholder at the time the donation was made.
- (4) If a person who is a public officer (other than as the ICAC) is appointed as the ICAC, the person cannot perform any functions as the ICAC while the person remains a public officer.

(5) In this section:

reportable donation means a gift or loan that is required to be disclosed or reported under Part 10 of the *Electoral Act* or under a similar law in force in the Commonwealth or in a State or another Territory.

112 Term of appointment

- (1) The appointment of a person as the ICAC is for a period of 5 years.
- (2) A person who is the ICAC may be reappointed, if still eligible, for one further period of 5 years.

113 Conditions of appointment

- (1) The ICAC holds office on the conditions (including conditions about remuneration, expenses and allowances) determined by the Administrator.
- (2) The ICAC's conditions of office:
 - (a) cannot provide any conditions (for example as to remuneration) that are contingent on the ICAC's performance in office; and
 - (b) cannot be varied during the ICAC's term in office.

114 Leave of absence

The ICAC Minister may grant the ICAC leave of absence on the conditions decided by the ICAC Minister.

115 Vacancy in office

- (1) The office of ICAC becomes vacant if:
 - (a) the ICAC resigns under section 116; or
 - (b) the ICAC's appointment is terminated under section 117; or
 - (c) the ICAC is:
 - (i) found guilty of an offence, whether in the Territory or elsewhere, for which the maximum penalty is imprisonment for a term of at least 12 months, with or without a fine; or
 - (ii) sentenced to imprisonment for an offence, whether in the Territory or elsewhere and whether or not the sentence is suspended; or

- (d) the ICAC becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit; or
 - (e) the ICAC becomes a candidate for election as a member of an Australian parliament or a local government council; or
 - (f) the ICAC becomes a public officer (other than through reappointment as the ICAC); or
 - (g) the ICAC is no longer an eligible person for appointment.
- (2) A decision made, or other thing done, by the ICAC is not invalid only because the ICAC is no longer, or never was, an eligible person for appointment.

116 Resignation

The ICAC may resign by written notice given to the Administrator.

117 Suspension and termination of appointment

- (1) The Administrator may suspend the ICAC from duty if:
- (a) the ICAC becomes physically or mentally incapable of satisfactorily performing official duties; or
 - (b) the ICAC engages in corrupt conduct; or
 - (c) the ICAC engages in paid employment outside the duties of office without the ICAC Minister's approval; or
 - (d) the ICAC is absent from duty, without the approval of the ICAC Minister and without reasonable excuse, for 28 consecutive days or for 42 days in any 12 months.
- (2) The ICAC Minister must immediately give the ICAC a statement of reasons for the suspension.
- (3) Within 6 sitting days after the suspension, the ICAC Minister must table in the Legislative Assembly the statement and any written response by the ICAC.
- (4) If, within 6 sitting days after the statement is tabled, a resolution of the Legislative Assembly is passed by a two-thirds majority of all of the Assembly requiring the Administrator to terminate the ICAC's appointment, the Administrator must terminate the ICAC's appointment.

- (5) The suspension of the ICAC is lifted if:
 - (a) the ICAC Minister does not table the statement under subsection (3); or
 - (b) the Legislative Assembly does not pass a resolution in accordance with subsection (4).
- (6) The ICAC is entitled to be paid remuneration and allowances during the period of suspension.

118 Acting ICAC

- (1) The Administrator may appoint an eligible person for appointment as the ICAC to act as the ICAC:
 - (a) during a vacancy in the office; or
 - (b) during a period, or all periods, when the ICAC (or another Acting ICAC) is unable, or unavailable, to perform official duties.
- (2) The Administrator may appoint a person (including the Inspector) to act as the ICAC to investigate the conduct of the ICAC, the ICAC's Office or a member of ICAC staff, if the person:
 - (a) is an eligible person for appointment as the ICAC; and
 - (b) is not, and has never been, a public officer.
- (3) An appointment to act as the ICAC during a vacancy in the office may only be for a period or periods not exceeding in aggregate 6 months in any 12 months.
- (4) If the office of ICAC has been vacant for a period of 18 months, no further appointment to act as the ICAC during the vacancy can be made.
- (5) An Acting ICAC holds office on the conditions (including conditions about remuneration, expenses and allowances) determined by the Administrator.
- (6) Section 111(4) does not apply to an Acting ICAC, but an Acting ICAC cannot investigate a matter involving the conduct of:
 - (a) a public body in which they are employed or hold office; or
 - (b) a public body or public officer to which they provide services under any form of arrangement.

- (7) Concurrent appointments may exist under this section if the conditions of appointment distinguish the circumstances in which each appointee may act.

Example for subsection (7)

A person could be appointed as Acting ICAC in relation to a particular matter if the ICAC is unable to perform the ICAC's functions in relation to that matter and another person could be appointed as Acting ICAC in relation to another such matter being dealt with at the same time.

119 Oath before taking office

- (1) Before performing any functions as ICAC, the ICAC must take an oath that the ICAC will faithfully, impartially and truly perform the functions of the ICAC according to law.
- (2) Before performing any functions as Acting ICAC, an Acting ICAC must take an oath that the Acting ICAC will faithfully, impartially and truly perform the functions for which the Acting ICAC is appointed, according to law.
- (3) The oath must be administered:
- (a) for the ICAC – by the Administrator; or
 - (b) for an Acting ICAC – by the Administrator or the ICAC Minister.

Division 2 Staffing and administration

120 ICAC staff

- (1) The ICAC's staff consists of:
- (a) public sector employees employed for the ICAC; and
 - (b) persons employed in an Agency made available by the Chief Executive Officer of the Agency under an arrangement with the ICAC; and
 - (c) police officers made available by the Commissioner of Police under an arrangement with the ICAC; and
 - (d) persons engaged by the ICAC as consultants; and
 - (e) authorised officers appointed under section 128 who are not persons mentioned in paragraphs (a) to (d).

- (2) Unless otherwise agreed in writing between the ICAC and the Commissioner of Police, a police officer made available to the ICAC continues to have the duties, obligations, powers and privileges conferred or imposed on the police officer as a police officer.
- (3) However, subsection (2) is subject to section 121.

121 Staff not subject to external direction

In performing functions under this Act, a member of ICAC staff is subject only to the direction of the ICAC or another member of ICAC staff.

122 Delegation

- (1) The ICAC may delegate any of the ICAC's functions under this Act to a member of ICAC staff who in the opinion of the ICAC is a suitable person to perform the function delegated.
- (2) However, the ICAC cannot delegate a function under section 152(2) (alternative manner of service).

Note for section 122

Also, the ICAC cannot delegate the power of delegation – see section 46A(2) of the Interpretation Act.

123 Suitability checks

- (1) This section applies for the ICAC determining whether a person is a suitable person:
 - (a) to be or remain as a member of ICAC staff; or
 - (b) to be appointed or remain as an authorised officer; or
 - (c) to be delegated functions under section 122; or
 - (d) to perform functions under this Act in relation to a matter being dealt with by the ICAC.
- (2) The ICAC may request the person to do any of the following:
 - (a) provide or consent to a criminal history check and, if necessary, provide biometric data for that purpose;
 - (b) undergo a police intelligence or integrity check;
 - (c) declare personal interests the ICAC considers relevant;
 - (d) undergo a medical or psychological assessment;

- (e) make a statutory declaration in relation to matters determined by the ICAC to be relevant to the person's suitability.
- (3) The ICAC may take into account the person's past and present political opinion, affiliation or activity and the person's irrelevant criminal record, if:
 - (a) they appear relevant to the person's ability to be involved in a particular matter in a way that will be and appear to be impartial; or
 - (b) they may generally bring the ICAC's reputation for impartiality and integrity into disrepute; or
 - (c) they may affect the person's ability to carry out substantial parts of the person's role.
- (4) The acts mentioned in subsections (2) and (3) are specifically authorised for section 53 of the *Anti-Discrimination Act*.
- (5) This section does not apply in relation to the suitability of a person who is an Acting ICAC unless the person is also a member of ICAC staff.
- (6) In this section:

irrelevant criminal record, see section 4(1) of the *Anti-Discrimination Act*.

political opinion, affiliation or activity has the same meaning as in the *Anti-Discrimination Act*.

124 Handling information regarding suitability

- (1) Subject to subsection (2), the ICAC must not disclose any information about a person obtained as a result of action taken under section 123(2) to any person other than:
 - (a) the person; or
 - (b) the Inspector.
- (2) The ICAC may disclose information mentioned in subsection (1) to the extent necessary for any proceeding relating to action taken in relation to the person to which the information is relevant.
- (3) The ICAC must arrange for the secure storage of information mentioned in subsection (1) and for its destruction when it is no longer required.

125 Annual report

- (1) Within 3 months after the end of each financial year, the ICAC must give the ICAC Minister a report on the performance of the ICAC's functions during the year.
- (2) The report must include the following in relation to the financial year:
 - (a) the number and general nature of allegations of improper conduct made to the ICAC;
 - (b) the number and general nature of reports mentioned in section 20(4);
 - (c) the number and general nature of referrals;
 - (d) the number of search warrants issued to authorised officers;
 - (e) the number and general nature of any other warrants issued to authorised officers under a law of the Territory;
 - (f) the number and general nature of non-disclosure directions given;
 - (g) an indication of the kinds of activities conducted by the ICAC to prevent, detect and respond to improper conduct and the results of those activities;
 - (h) an indication of the kinds of activities conducted by the ICAC to prevent and respond to retaliation and the results of those activities.
- (3) The ICAC Minister must table a copy of the report in the Legislative Assembly within 6 sitting days after the ICAC Minister receives the report.

126 Guidelines and practice directions for ICAC staff

- (1) The ICAC must issue, and keep under review, guidelines for, or practice directions to, members of ICAC staff as to the manner in which functions under this Act are to be performed.
- (2) The ICAC must issue the guidelines or practice directions within 2 months after the commencement of this section.

127 Website

- (1) The ICAC must establish and maintain an appropriate website which includes the following information:
 - (a) an explanation of the ICAC's functions;
 - (b) contact details for the ICAC's Office;
 - (c) an explanation of how to make an allegation of improper conduct to the ICAC;
 - (d) an explanation of how to make a complaint about the ICAC to the Inspector;
 - (e) directions and guidelines issued under section 20;
 - (f) guidelines issued under section 103;
 - (f) guidelines and practice directions issued under section 126;
 - (g) annual reports of the ICAC;
 - (h) reports and public statements under Part 3, Division 7 that have been tabled in the Legislative Assembly or otherwise made available to the public;
 - (i) reports of the Inspector under section 134 that have been tabled in the Legislative Assembly.
- (2) The ICAC is not required to publish on the website any information, if the ICAC considers the publication:
 - (a) may compromise an investigation or the safety or wellbeing of a person; or
 - (b) by disclosing a methodology, may prejudice the ICAC's ability to carry out the ICAC's functions.

Division 3 Authorised officers

128 Appointment of authorised officers

- (1) The ICAC may appoint, in writing, a person to be an authorised officer.
- (2) The ICAC must not appoint a person to be an authorised officer unless satisfied that the person has the skills, qualifications, training and experience to properly perform the functions of an authorised officer.

- (3) Without limiting subsection (2), the ICAC may require that a person successfully complete a course of training specified by the ICAC before the person may be appointed as an authorised officer.
- (4) An appointment under this section may be for a specified period and may be subject to conditions or limitations specified in the notice of appointment.

129 Identity card

- (1) The ICAC must give an authorised officer appointed under section 128 an identity card stating the person's name and that the person is an authorised officer.
- (2) The identity card must:
 - (a) show a recent photograph of the authorised officer; and
 - (b) show the card's date of issue and expiry; and
 - (c) be signed by the officer.
- (3) This section does not prevent the issue of a single identity card to a person for this and another Act.

130 Return of identity card

- (1) A person who ceases to be an authorised officer appointed under section 128 must return the person's identity card to the ICAC within 21 days after the cessation.

Maximum penalty: 20 penalty units.

- (2) An offence against subsection (1) is an offence of strict liability.
- (3) It is a defence to a prosecution for an offence against subsection (1) if the person has a reasonable excuse.

Division 4 Oversight of ICAC

131 Appointment of Inspector

- (1) The Administrator must appoint an eligible person to be the Inspector for this Act.
- (2) A person is an **eligible person** for appointment as Inspector if:
 - (a) the person is an eligible person to be appointed as the ICAC; and

- (b) the person is not and has not been, at any time in the previous 12 months:
 - (i) the ICAC; or
 - (ii) a member of ICAC staff.
- (3) The Inspector holds office:
 - (a) for the period, not exceeding 5 years, specified in the instrument of appointment; and
 - (b) on the conditions (including conditions about remuneration, expenses and allowances) determined by the Administrator.
- (4) The Inspector's conditions of office:
 - (a) cannot provide any conditions (for example as to remuneration) that are contingent on the Inspector's performance in office; and
 - (b) cannot be varied during the Inspector's term in office.
- (5) If a person is appointed as Inspector for less than 5 years, the person may be reappointed, if still eligible, but not so that the aggregate period of appointment exceeds 5 years.

132 Functions of Inspector

- (1) The Inspector has the following functions:
 - (a) to evaluate the ICAC's performance and report on the evaluation;
 - (b) to receive and deal with complaints about the ICAC or members of ICAC staff;
 - (c) to make recommendations to the ICAC or public bodies regarding practices or procedures in relation to the performance of functions under this Act;
 - (d) to perform other functions conferred on the Inspector under this or another Act.
- (2) The Inspector is not subject to direction by any person about the way the Inspector performs the Inspector's functions.

133 Evaluation of ICAC

- (1) The Inspector must evaluate the performance of the ICAC for a financial year.

- (2) In evaluating the ICAC's performance, the Inspector must consider:
- (a) whether the ICAC and members of ICAC staff acted within power and in compliance with this Act and any other relevant Acts or subordinate legislation; and
 - (b) whether the ICAC has implemented any previous recommendations made by the Inspector; and
 - (c) any other matters the Inspector considers relevant.

134 Report on evaluation

- (1) The Inspector must prepare a report on an evaluation under section 133 and give a copy of the proposed report to the ICAC.
- (2) The Inspector must give the ICAC a reasonable opportunity to comment on the proposed report and include a fair representation of the ICAC's comments in the report.
- (3) The Inspector must give the report to the ICAC Minister and the ICAC within 3 months after the end of the financial year to which it relates.
- (4) The ICAC Minister must table a copy of the report in the Legislative Assembly within 6 sitting days after the ICAC Minister receives the report.

135 Complaints about ICAC

- (1) A person may complain about the ICAC, the ICAC's Office or a member of ICAC staff to:
 - (a) the ICAC; or
 - (b) the Inspector.
- (2) If the ICAC receives a complaint, the ICAC must notify the Inspector within 14 days.
- (3) The Inspector may deal with a complaint in any manner the Inspector considers appropriate.

136 Access to ICAC premises and information

- (1) For an evaluation or dealing with a complaint, the Inspector has full and free access to ICAC premises and all items in the possession or control of the ICAC.

- (2) The ICAC and members of ICAC staff must give the Inspector all reasonable assistance the Inspector requires for an evaluation or dealing with a complaint.

137 Further powers of Inspector

- (1) On completion of, or at any time during, an evaluation or dealing with a complaint, the Inspector may:
- (a) refer a matter to a law enforcement agency for investigation or prosecution; or
 - (b) refer a matter to the ICAC or a public body for investigation and disciplinary action against a public officer for which the ICAC or public body is responsible; or
 - (c) make recommendations to the ICAC or a public body about practices or procedures in relation to the performance of functions under this Act.
- (2) The Inspector may recommend to the ICAC Minister that an Acting ICAC be appointed under section 118(2) to investigate the conduct of the ICAC, the ICAC's Office or a member of ICAC staff if:
- (a) a complaint raises allegations of improper conduct of the ICAC, the ICAC's Office or a member of ICAC staff; or
 - (b) the Inspector becomes aware (in an evaluation or dealing with a complaint or otherwise) of information that, if true, would tend to show improper conduct of the ICAC, the ICAC's Office or a member of ICAC staff.

138 Confidentiality of information

- (1) In a report of an evaluation or in dealing with a complaint, the Inspector may disclose information obtained in the performance of functions only to the extent the Inspector considers necessary for the effective performance of the Inspector's functions.
- (2) In determining whether to disclose information, the Inspector must consider the effect of disclosure on:
- (a) any preliminary inquiries, investigations or referrals under this Act; and
 - (b) potential criminal proceedings; and
 - (c) the safety and wellbeing of any individual; and
 - (d) the effect of disclosure on an individual's reputation.

139 Staff of Inspector

- (1) The staff of the Inspector consists of:
 - (a) persons employed in an Agency made available by the Chief Executive Officer of the Agency under an arrangement with the Inspector; and
 - (b) persons engaged by the Inspector as consultants.
- (2) In performing functions under this Act, a member of Inspector staff is subject only to the direction of the Inspector or another member of Inspector staff.

Division 5 Offences

140 Unauthorised disclosure of information obtained in the course of performing official functions

- (1) A person commits an offence if:
 - (a) the person obtains information in the course of performing functions connected with the administration of this Act; and
 - (b) the person intentionally engages in conduct; and
 - (c) the conduct results in the disclosure of the information and the person is reckless in relation to the result.

Maximum penalty: 400 penalty units or imprisonment for 2 years.

- (2) Strict liability applies to subsection (1)(a).
- (3) Subsection (1) does not apply if:
 - (a) the person discloses the information:
 - (i) for the administration of this Act; or
 - (ii) for legal proceedings arising out of the operation of this Act; or
 - (iii) for dealing with a referral; or
 - (iv) for obtaining professional legal advice from a legal practitioner; or
 - (v) for obtaining professional assistance from a health practitioner; or

- (b) the person has knowledge of the information independently from obtaining it in the course of performing functions connected with the administration of this Act; or
- (c) the person is an independent entity, or an officer or employee of an independent entity, and:
 - (i) the information is not identifying information; or
 - (ii) the information is identifying information but the person has given consideration to the principles mentioned in section 88 and disclosure is reasonably necessary to perform the functions of the independent entity; or
- (d) the disclosure is authorised in writing by the ICAC or the Inspector; or
- (e) the information is otherwise available to the public; or
- (f) the person discloses the information believing on reasonable grounds that:
 - (i) circumstances of sudden or extraordinary emergency exist; and
 - (ii) disclosing the information is the only reasonable way to deal with the emergency; and
 - (iii) the risk that the disclosure is made in response to significantly outweighs any risk to a protected person in disclosing the information.

Note for subsection (3)

In addition to the circumstances mentioned in subsection (3), a person who discloses confidential information will not be criminally responsible for an offence if the disclosure is justified or excused by or under a law (see section 43BE of the Criminal Code).

141 Unauthorised disclosure of information in other circumstances

- (1) A person commits an offence if:
 - (a) the person obtains information from the ICAC, other than in the course of performing functions connected with the administration of this Act; and
 - (b) the information is confidential information and the person has knowledge of that circumstance; and
 - (c) the person intentionally engages in conduct; and

- (d) the conduct results in the disclosure of the information and the person is reckless in relation to the result.

Maximum penalty: 400 penalty units or imprisonment for 2 years.

- (2) Strict liability applies to subsection (1)(a).
- (3) Subsection (1) does not apply if:
- (a) the person discloses the information:
- (i) for the administration of this Act; or
 - (ii) for a legal proceeding; or
 - (iii) for obtaining professional legal advice from a legal practitioner; or
 - (iv) for obtaining professional assistance from a health practitioner; or
- (b) the person has knowledge of the information independently from obtaining the information from the ICAC; or
- (c) the information is information relating to the person and the person discloses it to a close family member; or
- (d) the disclosure is authorised in writing by the ICAC or the Inspector; or
- (e) the person discloses the information believing on reasonable grounds that:
- (i) circumstances of sudden or extraordinary emergency exist; and
 - (ii) disclosing the information is the only reasonable way to deal with the emergency; and
 - (iii) the risk that the disclosure is made in response to significantly outweighs any risk to a protected person in disclosing the information.

Note for subsection (3)

In addition to the circumstances mentioned in subsection (3), a person who discloses confidential information will not be criminally responsible for an offence if the disclosure is justified or excused by or under a law (see section 43BE of the Criminal Code).

(4) In this section:

close family member of a person means any of the following:

- (a) a spouse or de facto partner of the person;
- (b) a parent or grandparent (by blood or marriage) of the person;
- (c) a brother or sister (by blood or marriage) of the person;
- (d) a guardian for, or carer of, the person.

confidential information means information about improper conduct or an allegation of improper conduct, other than information that is otherwise available to the public.

142 Direction not to disclose certain information

- (1) The ICAC may, in writing, direct a person not to disclose:
 - (a) information given to the person by the ICAC; or
 - (b) that an investigation is being or has been conducted; or
 - (c) that the person has, under section 30, 32 or 68(1)(g), been required to give information or an item.
- (2) A direction under subsection (1) must include the following:
 - (a) if the regulations require the direction to be recorded in a register – the means of locating the direction in the register;
 - (b) the date the direction expires, which must be a date within 12 months after the date the direction is given, unless the direction is given to protect an individual's safety or wellbeing or to prevent disclosure of identifying information;
 - (c) a statement as to whether the direction is the first direction, or a subsequent direction, given to the same person in relation to the same information;
 - (d) a statement that the direction ceases to have effect if the information to which it relates becomes public knowledge.
- (3) Failure to comply with subsection (2) does not invalidate the direction, but if no date is specified as mentioned in subsection (2)(b), the direction expires 6 months after the date it is given.

- (4) A person given a direction under subsection (1) commits an offence if:
- (a) the person intentionally engages in conduct; and
 - (b) the conduct results in a contravention of the direction and the person is reckless in relation to the result.

Maximum penalty: 400 penalty units or imprisonment for 2 years.

- (5) Subsection (4) does not apply if:
- (a) the disclosure is made:
 - (i) to a legal practitioner for obtaining professional legal advice; or
 - (ii) to a health practitioner for obtaining professional assistance; or
 - (b) the person discloses the information believing on reasonable grounds that:
 - (i) circumstances of sudden or extraordinary emergency exist; and
 - (ii) disclosing the information is the only reasonable way to deal with the emergency; and
 - (iii) the risk that the disclosure is made in response to significantly outweighs any risk to a protected person in disclosing the information.
- (6) A direction may be given to a person more than once under this section in relation to the same information.

143 Failing to comply with requirement for information or items during investigation

- (1) A person commits an offence if:
- (a) a requirement under section 30 is given to the person; and
 - (b) the person fails to comply with the requirement:
 - (i) if an oral response to a question is required – immediately; or

- (ii) otherwise – within a reasonable time stated in the notice given under section 30(3)(b).

Maximum penalty: 100 penalty units.

- (2) An offence against subsection (1) is an offence of strict liability.
- (3) It is a defence to a prosecution for an offence against subsection (1) if the defendant has a reasonable excuse.

144 Contravening notice to attend, or give evidence at, examination or public inquiry

- (1) A person must not contravene a requirement given under section 32.

Maximum penalty: 100 penalty units.

- (2) An offence against subsection (1) is an offence of strict liability.
- (3) It is a defence to a prosecution for an offence against subsection (1) if the defendant has a reasonable excuse.

145 Contravening direction of ICAC at public inquiry

- (1) A person must not contravene a direction of the ICAC under section 44.

Maximum penalty: 100 penalty units.

- (2) An offence against subsection (1) is an offence of strict liability.
- (3) It is a defence to a prosecution for an offence against subsection (1) if the defendant has a reasonable excuse.

146 Contravening direction regarding whistleblowers

- (1) A person must not contravene a direction of the ICAC under section 104.

Maximum penalty: 100 penalty units.

- (2) An offence against subsection (1) is an offence of strict liability.
- (3) It is a defence to a prosecution for an offence against subsection (1) if the defendant has a reasonable excuse.

147 Falsely representing to be authorised officer

A person commits an offence if:

- (a) the person intentionally represents, by words or conduct, that the person or another person is an authorised officer; and
- (b) the representation is false and the person has knowledge of that circumstance.

Maximum penalty: 200 penalty units or imprisonment for 2 years.

148 Obstruction of authorised officer

(1) A person commits an offence if:

- (a) the person intentionally obstructs another person; and
- (b) the other person is an authorised officer; and
- (c) the authorised officer is acting in an official capacity and the person has knowledge of that circumstance.

Maximum penalty: 400 penalty units or imprisonment for 2 years.

(2) Strict liability applies to subsection (1)(b).

(3) In this section:

obstruct includes hinder and resist.

149 Misleading information

(1) A person commits an offence if:

- (a) the person intentionally gives information to another person; and
- (b) the information is misleading and the person has knowledge of that circumstance; and
- (c) the other person is acting in an official capacity and the person has knowledge of that circumstance.

Maximum penalty: 400 penalty units or imprisonment for 2 years.

- (2) A person commits an offence if:
- (a) the person intentionally gives a document to another person; and
 - (b) the document contains misleading information and the person has knowledge of that circumstance; and
 - (c) the other person is acting in an official capacity and the person has knowledge of that circumstance.

Maximum penalty: 400 penalty units or imprisonment for 2 years.

- (3) Subsection (2) does not apply if the person, when giving the document:
- (a) draws the misleading aspect of the document to the other person's attention; and
 - (b) to the extent to which the person can reasonably do so – gives the other person the information necessary to remedy the misleading aspect of the document.

Part 8 Miscellaneous matters

150 Protection from liability – acting in official capacity

- (1) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith when acting, or purportedly acting, in an official capacity.
- (2) Subsection (1) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.
- (3) This section does not derogate from Part VIIA of the *Police Administration Act*.
- (4) If a person is alleged to have acted in bad faith when acting, or purportedly acting, in an official capacity, a civil or criminal proceeding for the act may only be brought by leave of the Supreme Court.
- (5) The Supreme Court is not to grant leave unless satisfied there are substantial reasons for believing the person acted in bad faith.

151 Evidence in criminal proceedings

- (1) The section applies if:
 - (a) a person is prosecuted for an offence; and
 - (b) the court before which the person is prosecuted considers it desirable that particular evidence given to the ICAC that a person is otherwise prohibited by this Act from disclosing be made available to:
 - (i) the defendant; or
 - (ii) a legal practitioner representing the defendant; or
 - (iii) the prosecutor.
- (2) After giving the ICAC a reasonable opportunity to appear and make representations concerning the matter, the court may order that the ICAC make the evidence available to the court.
- (3) The court may then make the evidence available to the defendant, the defendant's legal practitioner or the prosecutor, if the court has examined the evidence and is satisfied that the interests of justice so require.

152 Service

- (1) A notice, direction or request under this Act may be given:
 - (a) by serving it on the recipient as authorised by section 25 of the *Interpretation Act*, or
 - (b) by sending it to the recipient's email address as an attachment to an email.
- (2) If it is impracticable to give a notice, direction or request as mentioned in subsection (1), or the ICAC becomes aware that a notice, direction or request so given has not come to the attention of the recipient, the ICAC may authorise it to be given in another manner.

Example for subsection (2)

The ICAC could authorise a notice, direction or request to be given to an recipient via a social media account operated by the recipient.

-
- (3) Subject to evidence to the contrary, a notice, direction or request sent as mentioned in subsection (1)(b) is taken to be given to the recipient when it is sent to the recipient's email address.

Note for section 152

See section 25(2) to (4) of the Interpretation Act for when notices, directions or requests served as mentioned in subsection (1)(a) are taken to be served.

153 Dealing with unclaimed property

- (1) This section applies to property that:
- (a) is lawfully in the possession of the ICAC under this Act; and
 - (b) is not required for the performance of the ICAC's functions under this Act or proceedings arising out of the performance of those functions.
- (2) The ICAC may apply to a court of competent jurisdiction for an order in relation to the property if it appears to the ICAC that no person is lawfully entitled to the property.
- (3) The court may order that the property be dealt with as the court considers appropriate.
- (4) Without limiting subsection (3), the court may:
- (a) order that the property be forfeited to the Territory; and
 - (b) make any necessary incidental or ancillary orders.
- (5) A person who is lawfully entitled to property that has been dealt with under this section may recover from the Territory, in a court of competent jurisdiction, the property or the value of the property, as a debt due to the person.

154 Regulations

- (1) The Administrator may make regulations under this Act.
- (2) The regulations may provide for the following:
- (a) registers to be kept by the ICAC;
 - (b) allowances to be paid to witnesses.

Note for section 154

See also Part VII, Division 2 of the Interpretation Act.

Part 9 Repeal and transitional matters for Independent Commissioner Against Corruption Act 2017

Division 1 Repeal

155 Act repealed

The *Public Interest Disclosure Act 2008* (Act No. 38 of 2008) is repealed.

Division 2 Transitional matters

156 Definitions

In this Division:

commencement means the commencement of section 155.

discloser, see section 4 of the repealed Act.

PID Commissioner means the Commissioner for Public Interest Disclosures under the repealed Act.

public interest disclosure, see section 4 of the repealed Act.

repealed Act means the *Public Interest Disclosure Act* as in force immediately before the commencement.

responsible authority, see section 8 of the repealed Act.

157 Protection continues for previous disclosures

Part 6 of this Act applies in relation to a public interest disclosure made under the repealed Act as if the disclosure were a protected communication.

158 Current investigations

- (1) This section applies if an investigation of a public interest disclosure was started, but not completed, before the commencement.
- (2) All information in the possession or control of the PID Commissioner immediately before the commencement in relation to the investigation is to be transferred to the ICAC.
- (3) The ICAC is to deal with the matter as if the public interest disclosure were a protected communication made to the ICAC.

- (4) Within a reasonable time after the commencement, the ICAC must give written notice to the discloser of the following:
 - (a) that the ICAC has inherited the matter;
 - (b) the action the ICAC has taken, or proposes to take, in relation to the matter.

159 Relocation of public officers

- (1) Section 18 of the repealed Act continues to apply on and after the commencement in relation to a request made under that section before the commencement that had not been decided before the commencement.
- (2) Section 19 of the repealed Act continues to apply on and after the commencement, as if a reference in that section to the PID Commissioner were a reference to the ICAC, in relation to:
 - (a) a decision made under section 18 of the repealed Act before the commencement, if the public officer had not applied for a review under section 19 of the repealed Act before the commencement; or
 - (b) an application for review under section 19 of the repealed Act made, but not decided, before the commencement; or
 - (c) a recommendation made, but not responded to, under section 19(5) of the repealed Act before the commencement.

160 Non-disclosure directions

- (1) A direction in force under section 53B of the repealed Act immediately before the commencement remains in force after the commencement for a period of 6 months, unless revoked earlier, as if it were a direction given by the ICAC under section 142.
- (2) A further direction may be given under section 142 in relation to the information to which a direction mentioned in subsection (1) relates as if section 142(1) included the matters mentioned in section 53B(1) of the repealed Act.

161 Report about implementing recommendations

- (1) This section applies if, before the commencement, the PID Commissioner made a requirement under section 32(1) of the repealed Act but the responsible authority had not complied with the requirement before the commencement.

- (2) Sections 32 and 33 of the repealed Act continue to apply on and after the commencement in relation to the requirement and, for that purpose:
- (a) a reference in those sections to the PID Commissioner is a reference to the ICAC; and
 - (b) a reference in those sections to the Minister is a reference to the ICAC Minister.

162 Provisions if Act does not commence at start of financial year

- (1) This section applies if the commencement is on a day other than 1 July.
- (2) The first annual report of the ICAC under section 125, and the first evaluation of the ICAC under section 133, is to cover the period from the commencement to the end of the first full financial year after the commencement.

Schedule 1 Matters ICAC to take into account in performing functions

section 18

- 1 The object of this Act.
- 2 The public interest in the following:
 - (a) acting and being seen to act fairly and impartially;
 - (b) not interfering with an individual's rights, privileges or privacy, beyond what is reasonably necessary to carry out ICAC's functions effectively;
 - (c) upholding the rule of law;
 - (d) the separation of powers, including the independence of the judiciary and the Legislative Assembly's right to control its own affairs;
 - (e) cultural sensitivity and the reasonable accommodation of persons with special needs;
 - (f) persons in positions of seniority or power in the public sector exhibiting appropriate behaviour commensurate with those positions;
 - (g) public officers and public bodies taking responsibility for ensuring improper conduct is detected and dealt with appropriately;
 - (h) ensuring offences involving improper conduct are investigated and prosecuted;
 - (i) the general deterrence of improper conduct;
 - (j) the ICAC obtaining, and continuing to be able to obtain, information about improper conduct;
 - (k) minimising the risk of retaliation;
 - (l) the proper functioning of democratic processes;
 - (m) avoiding prejudice to current and possible future prosecutions.

- 3 The impact of the ICAC's activities on the following:
 - (a) the ability and capacity of public officers and public bodies to perform their functions, especially if those functions involve critical or front-line services;
 - (b) investigations by law enforcement agencies;
 - (c) current and possible future legal proceedings.
- 4 The need for the ICAC to target public resources most effectively, including by the following:
 - (a) considering alternatives to carrying out an investigation in order to prevent or minimise improper conduct;
 - (b) prioritising the most serious, systemic and sensitive matters;
 - (c) prioritising matters with present relevance;
 - (d) considering relevant statutory timeframes for related prosecution or disciplinary action;
 - (e) considering the extent to which a matter has already been investigated;
 - (f) considering the extent to which relevant and reliable evidence of improper conduct is available;
 - (g) referring matters to another entity;
 - (h) giving directions and guidance to a referral entity;
 - (i) taking back a matter from a referral entity;
 - (j) declining to investigate matters as appropriate;
 - (k) generally altering a course of action according to information received in order to meet changing circumstances.
- 5 Matters should be dealt with by the ICAC in private, unless it is in the public interest to do otherwise, taking into account the following:
 - (a) the desirability of the public sector being open and accountable to the public;
 - (b) the benefit of exposing improper conduct to public scrutiny;
 - (c) the extent to which allegations of improper conduct are already in the public domain;

- (d) the extent to which allegations of improper conduct raise issues of continuing public interest;
 - (e) the risk that a person may suffer undue hardship, including undue prejudice to the person's reputation;
 - (f) the needs of persons who have assisted in identifying or investigating improper conduct and particularly the need to protect information that may identify those persons;
 - (g) any views expressed by persons who would be affected by a decision whether to handle a matter in private or public;
 - (h) the educational value and benefit to research and policy development of sharing details of matters about which the ICAC has particular knowledge.
- 6 Any other circumstances the ICAC considers relevant.

Schedule 2 Information for persons making protected communications

section 95

- 1 A statement that:
 - (a) reporting improper conduct so that it can be dealt with is encouraged by the ICAC; and
 - (b) the person is not entitled to know the full details of subsequent investigations or disciplinary action that may result from the information, but the person may contact the ICAC's Office for a general outline of action taken on the basis of the information; and
 - (c) keeping the person's identity confidential reduces the risk of retaliation; and
 - (d) the person is responsible for seeking assistance at an early opportunity if they experience or fear retaliation; and
 - (e) the person consider accessing support services at an early opportunity to assist them to consider and manage the impacts of making the protected communication.
- 2 An indication of who is likely to be given access to the information in the communication and what is likely to be done with the information.
- 3 Advice to the person:
 - (a) to take care in communicating the information to other persons in ways that are not protected communications; and
 - (b) of the ability of the person to apply for a declaration that an action taken by the person in relation to the information is a protected communication.
- 4 Information about what constitutes retaliation and what the person can do if they experience or fear retaliation.
- 5 A statement of the importance of not providing false or misleading information, the penalties for providing that information and the opportunity to retract or clarify that information.
- 6 Information about support services mentioned in item 1(e).

ATTACHMENT C

INDEPENDENT COMMISSIONER AGAINST CORRUPTION BILL 2017

EXPLANATORY NOTES

Consultation

The Department of the Attorney-General and Justice is seeking your comments and suggestions on the Exposure Draft of the Independent Commissioner Against Corruption Bill 2017 (the 'ICAC Bill').

Comments can be as short or informal as an email or letter, or you may provide a more substantial document. Comments do not have to address all aspects of the Exposure Draft legislation. Electronic copies should be sent if possible. Comments should be sent:

by email to Policy.AGD@nt.gov.au

by post to:

Director, Policy Coordination
Department of the Attorney-General and Justice
GPO Box 1722,
DARWIN NT 0801

The closing date for comments on this Exposure Draft Bill and Regulations is Wednesday 26 July 2017.

Any feedback of comment received by the Department of the Attorney-General and Justice will be treated as a public document unless clearly marked as 'confidential'. In the absence of such clear indication, the Department of the Attorney-General and Justice will treat the feedback or comment as non-confidential. Please do not include any other person's personal information in your comment—as this may result in your submission not being published in whole or in part. Non-confidential feedback of comments will be made publicly available and published on the Department of the Attorney-General and Justice website. The Department of the Attorney-General and Justice may draw upon the contents of such and quote from them or refer to them in reports, which may be made publically available.

Any requests made to the Department of the Attorney-General and Justice for access to a confidential submission, feedback or comment will be determined in accordance with the *Information Act*.

Note: Although every care has been taken in the preparation of these Explanatory Notes to ensure accuracy, it has been produced for the general guidance only of persons wishing to provide comments on the issues. The contents of the notes do not constitute legal advice or legal information and they do not constitute Government policy documents.

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Schedule 1 70

Schedule 2 70

General Outline

The Bill proposes the creation of the Independent Commissioner Against Corruption ('ICAC'), a new anti-corruption watchdog for the Northern Territory. The ICAC is a body empowered to investigate the most serious corruption in the Northern Territory public sector. The Bill is a step towards implementing in principle 50 of the 52 Recommendations of the Report by Commissioner Martin AO QC as a result of his Anti-Corruption, Integrity and Misconduct Commission Inquiry ('the Martin Report').

Public Interest Disclosure Act to be repealed:

The Bill repeals the *Public Interest Disclosure Act*, and the ICAC replaces the Commissioner for Public Interest Disclosures ('Commissioner for PID'). The ICAC will take over the Commissioner for PID's ongoing investigations and whistleblower protection functions when the legislation commences.

ICAC will have broad jurisdiction and extensive powers:

The ICAC created by the Bill is an independent statutory office holder, but has broader jurisdiction and more extensive powers than the Commissioner for PID. Notably, the ICAC can investigate any public officer, including Members of the Legislative Assembly, and can do so of its own motion. In addition to the extensive powers it has to obtain information from public bodies, the ICAC can apply for warrants to search private premises. Consequential amendments to other legislation will make it possible for the ICAC to install surveillance devices, intercept telecommunications activities, and conduct covert operations.

Bill provides for voluntary and mandatory reporting, and whistleblower protection:

In order to ensure that the ICAC is able to obtain the information it needs to function effectively, the Bill provides that public officers are required to report corrupt conduct to the ICAC. The Bill also provides extensive protection to persons who report information about improper conduct. These protections include the protections currently available to whistleblowers under the *Public Interest Disclosure Act*, but include some additional measures to assist in the flexibility and workability of these mechanisms. In particular, the ICAC now has a power to direct public bodies to take action to protect a whistleblower, and a whistleblower who suffers an act of reprisal can now commence an action knowing that costs can only be awarded against them if the action was vexatious or without reasonable cause. The Bill makes clear that a person who reports information to the ICAC in good faith, believing it to be a report about improper conduct, is a person who acquires protection under the scheme. See Part 6 of the Bill for the whistleblower protection provisions.

Who can be the ICAC?

The ICAC is a person rather than a body corporate. The Bill provides strict conditions of eligibility for the ICAC and the Inspector, including requiring extensive legal experience. Persons who have had significant involvement in politics in the preceding five years are ineligible for appointment as the ICAC. If the ICAC encounters a conflict of interest, an Acting ICAC can be appointed concurrently to conduct the investigation. This Acting ICAC is completely independent from the ICAC, and can exercise any of the ICAC's statutory powers, but only for the purpose of carrying out a particular investigation.

Oversight of the ICAC

Oversight of the ICAC is provided by the Inspector, who has the ability to receive complaints about the ICAC, review the ICAC’s records, and requires the ICAC or staff of the ICAC to answer questions. If the Inspector has reason to believe the ICAC or the ICAC’s staff have been involved in improper conduct, the Act provides that a person with the powers of the ICAC can be appointed as a concurrent Acting ICAC investigate particular allegations. To avoid potential cross-investigations and conflicts, such an Acting ICAC cannot themselves have ever been a Territory public officer, and is ineligible to be appointed as the ICAC for two years following the investigation.

Consequential Amendments

In addition to the provisions in the Bill, there will be numerous consequential amendments of other legislation. These consequential amendments are still being refined, and may be introduced as a separate Bill. However, the following table provides an indicative summary of the matters that the consequential amendments will cover:

Legislation	Objective of Amendments
<i>Criminal Code Act</i>	- To provide that relevant corruption offences in Part IV of the Criminal Code are applicable to public officers as defined by the ICAC Bill.
<i>Correctional Services Act</i>	- To require the Commissioner of Correctional Services to facilitate the ICAC’s access to premises and records. - To place special requirements around processes for handling correspondence when a prisoner is a whistleblower or assisting the ICAC.
<i>Criminal Records (Spent Convictions) Act</i>	- To allow the ICAC to access information about spent convictions.
<i>Housing Act</i>	- To remove a reference to the <i>Public Interest Disclosure Act</i> which will be obsolete.
<i>Information Act</i>	- To provide for an exemption that can be applied to freedom of information requests to protect the ICAC’s functions, the Inspector’s functions, and identifying information concerning whistleblowers. - To modify the exemption for the <i>Public Interest Disclosure Act</i> , so whistleblowers and confidential investigations continue to be protected after that Act’s repeal.
<i>Interpretation Act</i>	- To define the term ‘ICAC’ so that it can be used and recognised in other Acts.
<i>Legislative Assembly (Disclosure of Interests) Act</i>	- To authorise the ICAC to inspect and take copy of the register of interests for Members of the Legislative Assembly.
<i>Police (Special Investigative and Other Powers) Act</i>	- To allow the ICAC to conduct controlled operations, similar to powers NT Police currently have.
<i>Public Sector Employment and Management Act</i>	- To provide that the Commissioner for Public Employment can deal with referrals from the ICAC under the <i>Public Sector Employment and Management Act</i> .

	- To provide that the ICAC is always the CEO of the ICAC's Office which is an Agency within the meaning of that Act
<i>Surveillance Devices Act</i>	- To allow the ICAC to install and use surveillance devices, similar to powers NT Police currently have.
<i>Telecommunications (Interception) Northern Territory Act</i>	- To provide that the ICAC has the power to intercept telecommunications, similar to powers the NT Police currently have. - (Note: these amendments will set up a framework that will allow the NT to apply to the Commonwealth Government for an exemption from Commonwealth offences that would otherwise apply to telecommunications interception activities.)
<i>Witness Protection (Northern Territory) Act</i>	- To allow persons who need physical protection as a result of their involvement with the ICAC to be considered for protection under the whistleblower protection scheme.
<i>Education and Care Services (National Uniform Legislation) Act</i>	- To remove what will be an obsolete reference to the <i>Public Interest Disclosure Act</i> .
<i>Evidence (National Uniform Legislation) Act</i>	- To replace a reference to the <i>Public Interest Disclosure Act</i> to the present Bill.
<i>Rail Safety (National Uniform Legislation) Act</i>	- To remove what will be an obsolete reference to the <i>Public Interest Disclosure Act</i> .

Comparable Interstate Legislation

At a number of points in these notes, references are made to equivalent interstate legislation to the ICAC Bill. The following abbreviations are used:

NSW ICAC Act – *Independent Commission Against Corruption Act 1988* (NSW)

SA ICAC Act – *Independent Commissioner Against Corruption Act 2012* (SA)

Vic IBAC Act – *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic)

WA CCC Act – *Corruption, Crime and Misconduct Act 2003* (WA)

Qld CC Act – *Crime and Corruption Act 2001* (Qld)

A Note on Offences and Penalties

The Bill provides for a typical array of offences for a body of this nature, including a mix of strict liability offences (which are easier to prove but carry lower penalties, because a person can be liable regardless of whether they intended to commit the offence), and offences that require intention / reckless to be proved (which, if made out, carry higher penalties).

The more major offences carry a maximum penalty of 400 penalty units or 2 years imprisonment. While 400 penalty units would more often align with a penalty of 4 years imprisonment, the penalty chosen reflects a further consideration: coercively obtained evidence can be led in criminal proceedings for offences against this Bill, and a policy decision has been made to avoid such

evidence being admitted into proceedings for an indictable offence. The particular rationale for particular penalties is explained in the notes for the clause containing that offence and penalty.

The penalties are similar to those used in the *Public Interest Disclosure Act*, which this Bill repeals and replaces, and are in a similar range to interstate equivalents. These offences and penalties have been effective in ensuring compliance with request of the PID Commissioner during the past 7 or so years the *Public Interest Disclosure Act* has been operational.

Following is a summary of the Bill by reference to each clause of the Bill.

Part 1 – Preliminary & Definitions

1. Short title

This is a formal clause, which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Independent Commissioner Against Corruption Act 2017*. It reflects that the Bill creates the role of an independent statutory officer who is charged with investigating and dealing with corruption in accordance with the provisions of the Bill.

2. Commencement

This is a formal clause that provides that the Act will commence on a day fixed by the Administrator by notice in the NT Government Gazette.

3. Primary Object

The objects of the Act provide guidance as to Parliament's intention, which assists in the interpretation of the Act, particularly with respect to exercising discretion. It clarifies that while most of the ICAC's powers and procedures are directed towards investigation, investigation is not an end in and of itself. The ultimate goals of the ICAC in carrying out its functions are to:

- prevent or minimise the occurrence of improper conduct;
- 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.

While the ICAC's jurisdiction is defined broadly, its role is not to usurp the function of other public bodies but to be able to address gaps in the existing integrity framework. In particular, the ICAC will have strong powers suitable for dealing with the most serious, systemic, and sensitive improper conduct, and that is where it is supposed to direct most of its efforts and resources. However, it is also able to look at more minor matters when these are part of the allegations of corrupt conduct, and to coordinate a response to improper conduct that involves multiple bodies. Its broad jurisdiction ensures it is able to fulfil this role, and also assist it to gather adequate intelligence by broadly defining the matters that can be reported to the ICAC under the whistleblower protection scheme.

4. Definitions

This clause provides an alphabetical list of simpler definitions of key words and expressions used in the Act. Where a definition is more complex, this clause directs the reader to the appropriate clause of the Act where the clause is fully defined. The definitions are intended to be read in conjunction with statute book wide definitions already contained in the *Interpretation Act*.

While the defined terms are provided alphabetically in the Bill, they have been grouped here conceptually to assist in understanding what has been defined and how these terms are used in the Bill:

Terms defining persons and bodies who can exercise powers under this Bill:

A number of different entities are defined:

‘Acting ICAC’ is defined under clause 118. At various points, the Bill distinguished between an Acting ICAC and an Acting ICAC appointed under clause 118(2)—the latter means an Acting ICAC appointed to investigate the ICAC, the ICAC’s Office, or a member of the ICAC staff, and has additional eligibility requirements;

‘Assembly Committee’ is defined under clause 5, which refers to designating a committee of the Legislative Assembly to handle certain matters concerning the ICAC;

‘authorised officer’ means the ICAC or a person appointed by the ICAC to exercise the ICAC’s coercive powers. It is used in clauses concerning applications for search warrants and other exercises of the ICAC’s power in Part 4, and is used to reflect the fact that it may be the ICAC or an investigator appointed by the ICAC who exercises these powers in practice. It is used in Part 5 to set out how authorised officers must handle privileged material. Part 7, Division 3 provides for the appointment of authorised officers and issuing of identity cards. Clauses 147 and 148 provide that it is an offence for a person to obstruct or falsely represent that they are an authorised officer;

‘ICAC’ means the statutory role of the Independent Commissioner Against Corruption established by clause 15. A consequential amendment to section 17 of the *Interpretation Act* will be made provide a definition of the term ‘ICAC’ which can be used throughout NT legislation;

‘ICAC’s Office’ refers to the staff that the ICAC administers. The Bill creates the ICAC as a statutory officer with staff who assist. A consequential amendment to Schedule 1 of the *Public Sector Employment and Management Act* will ensure that the Office is a separate Agency and the ICAC is the CEO of that Agency;

‘Inspector’ means a statutory role appointed to conduct audits of the ICAC and investigate complaints in order to ensure that the ICAC is not acting *ultra vires* (beyond power), and is appointed under clause 131;

‘member of ICAC staff’ is defined by clause 120, and broadly includes employees, seconded employees and officers of another Agency, and consultants. Subclause (2) provides that a seconded police officer continues to have powers and duties as a police officer unless otherwise provided by agreement between the Commissioner of Police and the ICAC;

‘member of Inspector’s staff’ is defined by clause 139, and means persons engaged by the Inspector as consultants, or Agency staff made available to the Inspector under an arrangement;

Terms used to define the ICAC’s eligibility:

‘Australian parliament’ is a term used in clause 111 with respect to the eligibility of the ICAC. The ICAC cannot be a member of an Australian parliament. It is also used in clause 115 to provide that the ICAC’s appointment is automatically terminated if the ICAC becomes a candidate for election as a member of an Australian parliament;

‘eligible person’ is used to refer to a person who may be appointed as the ICAC or the Inspector, at clauses 111 and 131 respectively;

‘superior court’ is a term used in clause 111 with respect to the eligibility of the ICAC. A former judge of a superior Court is an eligible person for appointment as the ICAC. Superior Court means a Supreme Court, Federal Court, or High Court of Australia.

Terms relating to referrals:

‘independent entity’ is a term used to define entities that handle referrals from the ICAC with a greater degree of independence. These bodies are statutory officers or bodies that have a high degree of independence and would usually conduct their functions without oversight, or bodies from other jurisdictions that could not be subject to the ICAC’s direction but may be suitable to handle a referral of an allegation of improper conduct.

Whether the Commissioner of Police is an independent entity is dependent on the circumstances. Generally, when criminal matters are referred to Police for further investigation, the Commissioner of Police will be treated as an independent entity. Investigating such matters are part of the core functions of Police and it would not be desirable for such investigations to be complicated by coordinating with the ICAC unless this was necessary. However, where such allegations concern alleged improper conduct by a police officer, or the ICAC has good reason to maintain oversight of the matter, the Commissioner of Police is not treated as an independent entity.

It should be noted that misconduct or unsatisfactory conduct referred to Police can also be oversighted by the Ombudsman in accordance with the Ombudsman’s existing responsibilities to oversight investigations into misconduct by Police.

‘law enforcement agency’ is defined broadly to include any Australian entity that has functions in relation to the investigation or prosecution of offences. Law enforcement agencies are one kind of body that the ICAC can refer matters to under clause 23. A broad definition has been adopted rather than a list of bodies, since the ICAC has discretion not to refer if there is good reason not to refer and a list of bodies would require continual updating, which would be onerous particularly with respect to interstate bodies;

‘referral’ means the referral of a matter by the ICAC in accordance with Part 3, Division 4, which can be found at clauses 23 to 28. This Division specifies who are appropriate bodies to accept different kinds of referrals, permits consultation and information sharing for the purpose of a referral (including for discussions about whether to refer a matter), and provides that the ICAC can exercise oversight over referral entities that are not independent entities;

‘referral entity’ is a body to which the ICAC can refer a matter and is defined by clause 23.

Defined jurisdictional concepts:

The following concepts which affect the ICAC’s jurisdiction are defined:

‘conduct’ and a range of related terms are listed in this clause, namely **‘corrupt conduct’**, **‘engage in conduct’**, **‘improper conduct’**, **‘misconduct’**, **‘unsatisfactory conduct’**, **‘anti-democratic conduct’**, and **‘occur’**. This clause refers to the full definitions of these terms in Part 1, Division 2, which is found at clauses 8-14;

‘public body’ refers to clause 14, which defines those bodies that can be investigated by the ICAC for improper conduct;

‘public officer’ refers to clause 14, which defines those persons who can be investigated by the ICAC for improper conduct. The following related terms are also found in clause 4 and define specific categories of public officers:

- ‘**judicial officer**’ is defined to include a judge of either the Supreme or Local Courts of the Northern Territory, and also includes the position that is presently known as the ‘Master’ of the Supreme Court;
- ‘**MLA**’ is defined to mean a member of the Legislative Assembly;

‘**breach of public trust**’ is a category of improper conduct that helps to define the ICAC’s jurisdiction. The ICAC’s jurisdiction is defined by clauses 9-12 to relate to conduct that has the requisite seriousness, the requisite connection to public affairs, and the requisite quality of wrongfulness. The term ‘breach of public trust’ is used to define the quality of ‘wrongfulness’ needed for a matter come within the ICAC’s jurisdiction. This statutory definition of ‘breach of public trust’ replaces the common law definition for the purpose of this Act.

The statutory definition of ‘breach of public trust’ provides that a conduct is a breach of public trust to the extent that the public officer or public body is acting in a way that is intentionally or recklessly inconsistent with the functions of the body or officer, including the duty of the body or officer to act in the public interest.

The functions of the body or officer are its official functions.

The language of this definition is intended to give effect to the substance of the proposed jurisdiction of the ICAC as recommended in paragraph [149] of the Martin Report, particularly at points (1)(a) and (1)(c), bearing in mind the interpretation of a similar provision by the High Court in *Independent Commission Against Corruption v Margaret Cunneen & Ors* [2015] HCA 14 (‘the *Cunneen case*’). The other points of paragraph [149] are addressed particularly through clause 10 of the Bill.

When the statutory definition of breach of public trust is combined with the statutory tests for seriousness and connection with public affairs, a breach of public trust is only corrupt conduct that the ICAC would investigate when it is also serious enough that it warrants termination of service or is an offence that carries a maximum penalty of more than two years imprisonment, and occurs in the course of the person carrying out their duties as a public officer or is otherwise sufficiently connected to public affairs.

The definition in the Bill represents a variation from the use of the term at common law, because the common law term evolved to describe a criminal offence and incorporates tests for wrongfulness, seriousness, and connection to public affairs that do not quite align with the tests provided in the Bill. At common law, ‘breach of public trust’ defines the relevant wrongfulness in terms of ‘dishonesty’, ‘wilfulness’, ‘malice’ and ‘intention’ (see, for example *R v Quach* (2010) 27 VR 310). At common law, these elements were used to determine both the seriousness and wrongfulness of a matter that was appropriate for criminal sanctions.

By contrast, the ICAC’s jurisdiction and purpose is not simply to investigate criminal matters. The ICAC’s jurisdiction also relates to conduct that would warrant termination of service or disciplinary action. It would be confusing and inconsistent to incorporate the common law’s requirement of wilfulness, malice, and intention in addition to these tests. Conduct that is serious enough to warrant termination of service is intended to be within the ICAC’s jurisdiction irrespective of whether it was motivated by malice. For example, it may simply be conduct that is intentional but not intentionally malicious, but shows a gross disregard of the public interest, and due to surrounding contextual factors such as the seniority of the position it would warrant termination of service.

As mentioned above, in developing this definition, consideration was given to the *Cunneen case*. The decision in that case limited the jurisdiction of the NSW ICAC to conduct that had an element of

wrongful behaviour by the relevant public officer. In that case, the ICAC suggested that it had jurisdiction to investigate a matter where there was an alleged attempt by a public sector officer in a private capacity to adversely impact the ability of a police officer to effectively carry out a breath test by engaging in conduct which, unbeknownst to the police officer, interfered with the test working effectively. The High Court disagreed, taking the view that the ICAC was limited to adverse effects to the ‘probity’ and not simply the ‘efficacy’ of official functions. ‘Probity’ referred to whether there was some kind of conscious engagement in wrongful conduct by the public officer, as distinct from ‘efficacy’, which referred to whether the public officer was able to achieve a particular result on a given occasion.

The definition in the Bill is intended to operate so that a person in the position of the police officer who administered the breath test in the *Cunneen* case would not have engaged in a ‘breach of public trust’ (and so not engaged in corrupt conduct) under the definition in the Bill. The police officer would not have behaved in a way inconsistent with his or her duties, just because a third person attempts to engage in conduct intended to impede the police officer in carrying out his or her duties effectively.

In the *Cunneen* case, it seems that the target of the NSW ICAC was not the police officer but Ms Cunneen, who was a very senior Crown prosecutor. The substance of the allegations being investigated was that Ms Cunneen allegedly advised a family friend who was pulled over for a random breath test to fake chest pains in order to delay the administration of a breath test to a point in time when the person’s blood alcohol content would presumably have lessened. The alleged actions were undertaken in a private capacity and not as a prosecutor or as a lawyer to a client.

Under the proposed definitions in the Bill, it is anticipated that the NT ICAC would also not investigate the prosecutor in an equivalent scenario to the *Cunneen* case, because the conduct would not have been inconsistent with the prosecutor’s duties, given that a prosecutor’s duties do not extend to the sort of private conduct alleged. The reference to ‘effective’ in ‘connected to public affairs’ is specifically worded to be limited to the effective performance of the duties of the public officer who is alleged to have committed the improper conduct.

The question of whether there has been a breach of public trust is determined by reference to the public officer’s duties at the time the conduct occurred. This means that if the allegations concern conduct that a person engaged in prior to becoming a public officer, or prior to taking up relevant duties as a public officer, the definition of ‘breach of public trust’ will not be satisfied and the ICAC will not have jurisdiction by virtue of that test.

However, it can be noted that in limited circumstances, namely certain offences specified by clause 10(5) of the Bill, being offences that specifically relate to corruption of public office, even conduct affecting the efficacy is included.

‘connected to public affairs’ – is an element of improper conduct that helps to define the ICAC’s jurisdiction. As discussed above in relation to ‘breach of public trust’, the ICAC’s jurisdiction is defined to relate to conduct that has the requisite seriousness, the requisite connection to public affairs, and the requisite quality of wrongfulness. To be investigable by the ICAC, conduct must satisfy all three tests. The connection to public affairs can be made in one of three ways:

- conduct that occurs in the course of or in circumstances closely related to the performance of official functions or duties of the public officer, including conduct engaged in otherwise than in the performance of official functions that adversely affects or could adversely affect the honest, impartial or effective performance of those functions (meaning, the functions of the public officer who has committed the conduct);

- conduct that involves the use of public resources; or
- conduct that involves the use of authority or perceived authority that a person has as a result of being a public officer or representing themselves as a public officer.

The term circumstances ‘closely related to the performance of official functions and duties’ is defined to include conduct that is engaged in while off duty that adversely impacts or could adversely impact the honest, impartial, or effective exercise of the public officer’s official functions and duties. This is provided at clause 4(2).

‘function’ – this term is defined to include a duty and power, which is a standard definition designed to ensure that the term function is not subject to technical arguments that its ambit is narrow and confined to functions that are not duties or powers. The related term **‘perform’** provides that to perform a function includes to exercise a power;

‘official information’ is used in clause 10 to define a kind of corrupt conduct, namely inappropriate conduct in relation to official information. ‘Official information’ extends beyond information held in formal records to information known to the public body or public officer in relation to official functions, including information that is not recorded.

‘public resources’ is defined broadly to include not only money, but assets, infrastructure, intellectual property, licences, human resources, and other resources of or available to the public sector. The term is used in the Bill to clarify the extent of the ICAC’s jurisdiction. Where conduct must be ‘connected to public affairs’, this term includes ‘conduct involving the use of public resources’. Clause 10 also provides that one element of corrupt conduct involves misappropriating or misusing public resources. Clause 12 provides that one element of unsatisfactory conduct is to take certain inappropriate action with respect to public resources.

Defined concepts for whistleblower protection:

The following concepts are defined in relation to the Bill’s whistleblower protection scheme:

‘engage in retaliation’ refers to action taken to retaliate against a whistleblower and other protected persons for making a protected disclosure, see clause 92;

‘harm’ is used for the purposes of defining what is retaliation under the Bill’s whistleblower protection scheme (see Part 6), and is defined broadly to include matters such as adverse conduct in the workplace, which is typical of whistleblower protection schemes. In addition, a separate, narrower definition is used in clause 109, which provides the threshold test for when the ICAC may take steps to protect a person’s physical safety.

‘identifying information’ refers to information that would allow someone to identify a whistleblower or other protected person. The Bill requires such information to be treated with particular care.

‘prohibited reason’ is a term used to define when action which harms a whistleblower or other protected person is prohibited, namely when the harm occurs in connection with the person making or being suspected of making a report about improper conduct, as defined by clause 92;

‘protected action’ refers to clause 89, which defines the kinds of reporting and assistance protected by the whistleblower protection scheme in the Bill. A person who takes protected action is a ‘protected person’. A ‘protected communication’ is a kind of protected actions. A person who assists

the ICAC in ways other than making a protected communication may also be taking a protected action.

‘protected communication’ is a term used to define what reports of improper conduct are protected by the whistleblower protection scheme, and its meaning is set out by clause 90. A protected communication must be made to person or body listed in that clause and also meet other criteria. Reports that do not technically meet the criteria of a protected communication can be declared to be a protected communication by the ICAC under clause 91 on a discretionary basis, after considering certain matters. The definition of protected communication is very similar to the definition of the term ‘disclosure’ used in the *Public Interest Disclosure Act* and other interstate public interest disclosure schemes, which are whistleblower schemes by another name.

‘protected person’ means a person who takes or has taken protected action. This term essentially refers to persons who are whistleblowers under the whistleblower protection provisions, as well as some additional persons.

‘retaliation’ refers to conduct aimed at harming a whistleblower or other protected person for their taking protected action or suspected protected action, and is defined by clause 92. Engaging in retaliation is an offence (either under clause 97 or 98 depending on the nature and circumstances of the retaliation), and is a matter for which compensation and injunctive remedies can be sought. The term retaliation is similar to an ‘act of reprisal’, which is sometimes used in public interest disclosure schemes. ‘Retaliation’ has been chosen for the ICAC Bill as a more intuitively understood term.

‘victim’ is defined in clause 92 to refer to a victim of retaliation.

Defined concepts for powers and procedures:

The following concepts are defined in relation to procedures:

‘public inquiry’ and related concepts. While most ICAC investigations will be handled in private, the ICAC does have the capacity to conduct public inquiries under Part 3, Division 6. Terms used for public inquiries include:

- **‘public inquiry’**, which is defined by clause 37. Part of an investigation may be handled by means of a public inquiry;
- **‘closed session’** and **‘open session’** are terms used to distinguish between those parts of a public inquiry that are open to the public and those that are held in private. See Part 5, Division 1, particularly clause 75;
- **‘public inquiry report’** – see terms relating to reports below;

‘investigation’ and related concepts, in particular:

- **‘give evidence’** – is defined by to broadly refer to answering a question, giving information, or producing a document or other thing for an investigation, meaning it is not limited to giving evidence during an examination;
- **‘investigation’** – the ICAC has the power to investigate in accordance under clause 29. This is a formal stage in the ICAC’s processes of responding to improper conduct. The term includes a joint investigation carried out in accordance with clause 36;
- **‘investigation report’** – see terms relating to reports below;

- **‘premises’** clarifies the meaning of this word for the purpose of provisions relating to search warrants. This clarification makes clear the definition extends beyond buildings to include land, entering any kind of structure on land, and aircraft, vehicles, and vessels;
- **‘search warrant’** means a search warrant issued under clause 65 of the Bill, which allows the ICAC to search private premises;
- **‘witness’** means a person who gives evidence for an investigation under this Act.

Terms relating to matters of **privilege**. Terms used include:

- **‘claimant’** is defined in clause 81 to mean a person who is entitled to claim privilege, and is used in Part 5, Division 2 to set out processes for resolving disputed claims of privilege;
- **‘parliamentary privilege’** – is defined by clause 80 and includes a privilege, immunity or power;
- **‘proper officer’** is defined by clause 81 and is used to refer to a designated person who acts as a representative of the Supreme Court with respect to handling privileged items;
- **‘representation’** has a specific meaning when used in Part 5, Division 1, where it is defined by clause 75 and is used to set out the subsequent use that can be made of evidence given in circumstances where the privilege against self-incrimination has been abrogated. The definition refers to the Dictionary to the *Evidence (National Uniform Legislation) Act*, where it is defined to include:
 - an express or implied representation (whether oral or in writing); or
 - a representation to be inferred from conduct; or
 - a representation not intended by its maker to be communicated to or seen by another person; or
 - a representation that for any reason is not communicated.
- **‘secured item’** means an item sealed in an envelope or otherwise secured in accordance with clause 85. ‘Item’ is also a defined term in the Bill (see below in definitions relating to ‘other matters’).

Various kinds of **reports**. Terms used include:

- **‘general report’** – as defined by clause 45, is a report on general matters that are not the results of a particular investigation. A general report could concern systemic issues, matters concerning the reporting of improper conduct, or matters impacting on the performance of the ICAC;
- **‘investigation report’** – is a report about the ICAC’s findings as a result of an investigation as defined by clause 47. It may or may not include recommendations;
- **‘public inquiry report’** – means a report resulting from a public inquiry made under clause 49;
- **‘brief of evidence’** – is a collection of information provided by the ICAC to a law enforcement agency (eg. Police, the DPP etc.) or public body for the purpose of investigating, prosecuting, or taking disciplinary action against a public officer. It is provided for by clause 48. It is not subject to the same restrictions on content and procedure as an investigation report, and would not typically contain recommendations
- **‘public statement’** is defined by clause 52, and provides circumstances in which it is clear that the ICAC may offer public comment, given the default position that the ICAC conducts matters in private and is subject to confidentiality obligations;

- ‘**responsible Minister**’ is used to designate an appropriate person to respond to recommendations and certain reports the ICAC can make, and is defined to mean the minister having responsibility for the area of government or activity that is applicable to the public body or public officer in question. This will necessarily turn on what is provided by the Administrative Arrangements Order in force at time the response is required, as provided by section 19(3) of the *Interpretation Act*.

Terms relating to **directions** the ICAC can issue, include:

- ‘**non-disclosure direction**’ – refers to the power to direct a person not to disclose confidential information under clause 142, which is more restrictive than the default confidentiality offence under clause 141;
- ‘**retention notice**’ means a notice issued under clause 68(e) and in accordance with the procedure set out in clause 69. A retention notice requires an object or thing not to be moved or interfered with. The object must be evidence of improper conduct and it is anticipated such a notice might be used with objects or things that cannot easily be seized, or there are other reasons to leave the object *in situ* for the time being and a retention notice may be sufficient to deter interference with the evidence;

Other matters:

‘**health practitioner**’ is a definition relevant to offences of disclosing confidential information (see clauses 140-142). It allows a person to reveal such information if it is necessary to obtain assistance from a medical practitioner or a registered psychologist.

‘**ICAC premises**’ is used in clauses 62 and 136 with respect to provisions defining who has access to the premises and information of the ICAC. The meaning of the term turns on occupation of premises by the ICAC, the ICAC’s Office, or a member of ICAC staff.

‘**item**’ – is a term used to refer to a document or thing;

‘**misleading information**’ includes information that is misleading in a material and specific way, including by omission. It is used in a number of clauses in the Bill:

- in relation to the definition of ‘corrupt conduct’ that the ICAC can investigate under clause 10(4);
- in relation to providing that a person cannot receive whistleblower protection for providing misleading information under clause 87;
- in the offence of providing misleading information to a person acting in an official capacity under this Act, which is clause 147.

‘**political party**’ is used both in the definition of anti-democratic conduct in clause 13 and in clause 111 to limit eligibility of persons to be appointed as the ICAC to persons without current or recent political affiliations, as defined by that clause. This Bill uses the definition of ‘political party’ in section 3 of the *Electoral Act*, namely ‘an organisation (whether incorporate or unincorporated) an object or activity of which is the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it’.

‘**public resources**’ is a definition used to specify the ICAC’s jurisdiction. Misappropriate and misuse of public resources is a kind of corrupt conduct specified by clause 10, and substantial mismanagement or inappropriate or significantly inefficient use of public resources is a kind of unsatisfactory conduct specified

by clause 12. The definition of the term makes clear that public resources are not just limited to cash and assets, but encompass intellectual property, human resources, and other less tangible resources.

5. Assembly Committee

This clause provides for the Legislative Assembly to designate a committee to carry out functions in relation to this Bill concerning ICAC matters. The committee may be a current committee or new committee established under the Legislative Assembly's existing power. Section 3 of the *Legislative Assembly (Powers and Privileges) Act* defines a committee.

6. Act binds Crown

This is a standard clause that provides that the Bill is intended to apply to the Crown. It is arguably clear that the Act binds the Crown by necessary implication, since it is nearly entirely directed to investigations of bodies that are emanations of the Crown. However, some aspects of the ICAC's jurisdiction allow investigations of persons and bodies that are not emanations of the Crown (eg. private persons engaged in collusive tendering). The provision is included for clarity. The provision (see clause 10(3)) that extends the ICAC's jurisdiction beyond public bodies in this way is derived from the NSW ICAC Act, and that Act includes a specific provision to bind the Crown.

7. Application of Criminal Code

This is a standard clause that provides that Part IIAA of the Criminal Code applies to an offence against this Act. Part IIAA of the Criminal Code states the general principles of criminal responsibility, establishes general defences, and deals with burden of proof. Part IIAA also defines, or elaborates on, certain concepts commonly used in the creation of offences.

8. Meaning of *conduct*

This clause defines the term 'conduct', which is in other clauses is used to assist in defining the different types of alleged actions that the ICAC is able to investigate. It specifies that conduct can be an act or an omission, that relevant conduct can have occurred before the commencement of the Act (the Act will be fully retrospective), and also the geographical and temporal nexus required. Clause 8 clarifies that the ICAC can investigate conduct by a person who was a public officer at the time the conduct occurred, even if the person is no longer a public officer.

Subclause (3) of this clause defines the circumstances where a public body is taken to have engaged in conduct engaged in by other persons or bodies. In real terms, public bodies can only engage in conduct through the actions of employees, officers, and agents. The circumstances where the public body can be investigated for the actions of other persons and bodies include when the person or body is acting on behalf of the public body, and when the public body has a corporate culture that directs, encourages, tolerates, otherwise causes, or fails to deter or prevent the conduct from occurring. It is implicit that a public body can only be held responsible for improper conduct if it can reasonably be taken to have a duty that relates to the kind of improper conduct in question.

In drafting this clause and having regard to the Martin Report there does not to be any reason to distinguish between politicians, public servants and juridical officers in relation to the retrospective application of the legislation to activities that may have occurred prior to the commencement of the legislation.

9. Meaning of *improper conduct*

This clause provides that ‘improper conduct’ is an overarching term to describe conduct that can be investigated by the ICAC. Improper conduct can be of a number of different types which are defined further in the Bill, including corrupt conduct (defined further at clause 10), misconduct (defined further at clause 11), unsatisfactory conduct (defined further at clause 12), and anti-democratic conduct (defined further at clause 13). A fifth type of improper conduct is conduct that amounts to an offence provided by the Bill. This includes various offences relating to failure to comply with the ICAC’s directions, misuse of confidential information, providing false or misleading information to the ICAC, and an act of retaliation against a whistleblower.

Subclause (2) defines a range of ways in which a person who does not themselves commit the improper conduct can nevertheless be investigated—this includes when improper conduct was attempted (but not carried out), when the person aided and abetted a person to commit improper conduct, incited improper conduct, or the improper conduct was carried out as a conspiracy or in the pursuit of a common purpose. The clause is written to align with definitions in the Criminal Code, but to enable investigation of improper conduct whether or not that improper conduct is also an offence.

10. Meaning of *corrupt conduct*

This clause defines the primary kind of improper conduct that is intended to be investigated by the ICAC. The Bill divides improper conduct generally into three tiers of seriousness. This is similar to the approach taken by the SA ICAC Act, and consistent with the Recommendations of the Martin Report. ‘Corrupt conduct’ is the highest tier, meaning it refers to the most serious kinds of improper conduct. The ICAC will primarily focus on investigating conduct that fits within the definition of ‘corrupt conduct’, as it should refer less serious conduct to other bodies to investigate in most circumstances (see clause 16(2)(b)).

The definition of corrupt conduct refers to actions of public officers and public bodies with the requisite degree of seriousness, wrongfulness, and connection to public affairs. The phrase ‘connected to public affairs’ is defined in the definition clause of the Bill.

Clause 10 of the Bill specifies the requisite degree of seriousness for corrupt conduct is:

- the conduct constitutes an offence for which the maximum penalty is imprisonment for a term of at least 2 years;
- for an MLA or local government councillor – the conduct involves a serious breach of public trust;
- for any other public officer – the conduct amounts to reasonable grounds for termination of service; or
- for a public body – the conduct is a serious breach of public trust.

The requisite kind of wrongfulness for corrupt conduct is:

- the conduct constitutes an offence; or
- the conduct involves dishonest, failure to manage a conflict of interest, breach of public trust (a term defined in the Bill), illegal or unauthorised or otherwise inappropriate performance of official functions, inappropriate conduct in relation to official information, or an adverse effect

on the honest, impartial or effective performance of official functions by any public officer or public body or group of public officer or public bodies.

In addition, further kinds of corrupt conduct that can be committed by any person (not just a public officer) are defined by subclause (4). These categories of corrupt conduct extended to persons outside the public sector were specifically recommended by the Martin Report, and the definition reflects categories of conduct prescribed by s 8(2A) of the *ICAC Act (NSW)*. These categories were inserted in NSW following the dispute in the *Cunneen* case to ensure that the ICAC could investigate certain matters that impacted on the integrity of the public sector, even if public officers were not knowingly involved in any impropriety. A discussion of the *Cunneen* case can be found on page 14 of these explanatory notes. Subclause (4) requires the connection to public affairs to be that the conduct would, if publicly known, impair confidence in public administration. The categories of wrongful conduct are:

- collusive tendering;
- intentionally or recklessly providing false or misleading information in order to obtain a licence, permit, or other authority to engage in conduct that would otherwise be prohibited by a regulatory scheme;
- misappropriating or misusing public resources;
- assisting with or dishonestly benefiting from the misappropriation or misuse of public resources; and
- dishonestly obtaining or retaining employment or appointment as a public officer.

The definition is worded to clarify that the kinds of licences and authorities referred to extend to ‘promoting or protecting health and safety, the environment or the amenity of an area’ as well as to ‘facilitate the management and commercial exploitation of resources’. Some changes have been made to ensure relevant NT statutory schemes for providing licences, permits, and authorities are within the NT ICAC’s jurisdiction. The Bill differs from the NSW ICAC Act in that it uses the wording ‘protect or promote’, ‘amenity’ as well as ‘environment’, and includes ‘public health’ alongside ‘health and safety’. The wording in the NSW ICAC Bill was potentially ambiguous in terms of whether it captured some relevant NT schemes.

In addition, any person can be investigated for conduct that would amount to a range of corruption offences specified in Part IV of the Criminal Code. As recommended by the Martin Report, a broad threshold test has been used, which relates to an adverse impact on the honest, impartial or effective performance of official functions by any public officer or public body. This is intended to ensure the example given in the Martin Report of a bribe offered to a public officer of unimpeachable honesty is a matter the ICAC can investigate. However, a change has been made from what was proposed in the Martin Report. The definition proposed in the Martin Report referred to investigating ‘any person’ for any offence with a penalty of 2 or more years imprisonment if this affected the effective performance of official functions. If this test were to be applied to ‘any person’, it would inadvertently capture conduct that does not have the flavour of corruption—for example, a private individual drunkenly resisting arrest. For this reason, the Martin Report’s recommended definition has been refined so that the ICAC’s jurisdiction to investigate persons who are not public officers refers to conduct that has the character of ‘corruption’ – which in subclause 10(5) includes a range of offences in Part IV of the Criminal Code, with the ability to prescribe further applicable offences by Regulation, if these are created or identified in the future. Public officers can be investigated for offences carrying a penalty of 2 or more years imprisonment. Private individuals who commit offences without the character of corruption such as resisting arrest may still be investigated by Police.

11. Meaning of *misconduct*

This clause defines the second tier of improper conduct. As a kind of improper conduct, misconduct can be reported under the whistleblower protection provisions, but as it is less serious than corrupt conduct, the ICAC will generally refer misconduct to another body for investigation. If referral is not appropriate, the inclusion of misconduct within the definition of improper conduct at clause 9 means that the ICAC still has the ability to investigate the allegation itself.

Similarly to corrupt conduct, it is defined by reference to seriousness, wrongfulness, and connection to public affairs.

Clause 11 of the Bill specifies the requisite degree of seriousness for misconduct. It must be conduct that falls short of corrupt conduct and where:

- the conduct constitutes an offence for which the maximum penalty is less than 2 years;
- for an MLA, local government councillor – a breach of public trust not amounting to a serious breach of public trust (serious breaches would be corrupt conduct);
- for a judicial officer – a breach of public trust (serious breaches are not excluded to ensure that a serious breach that is not grounds for termination of service of the judicial officer is still covered by the definitions of improper conduct);
- for any other public officer – the conduct amounts to reasonable disciplinary action; or
- for a public body – a breach of public trust not amounting to a serious breach of public trust.

The requisite kind of wrongfulness and connection to public affairs for misconduct is identical to that for corrupt conduct.

12. Meaning of *unsatisfactory conduct*

This clause defines the third tier of improper conduct, and refers to the least serious kinds of improper conduct. The definition closely follows conduct defined as ‘maladministration’ in the South Australian *ICAC Act*. The term ‘unsatisfactory conduct’ is intended to make the meaning of this kind of improper conduct more accessible to non-lawyers rather than to change the meaning of what is encompassed by the concept of maladministration.

Unsatisfactory conduct includes not only illegal and inappropriate conduct, but conduct that is negligent or incompetent. While this initially seems very broad, the kinds of conduct covered are further limited by other parts of the clause. In particular, the conduct must actually cause one of four negative outcomes:

- substantial mismanagement of public resources;
- inappropriate or significantly inefficient use of public resources;
- substantial mismanagement in relation to the performance of official functions; or
- substantial detriment to the public interest.

In addition, the clause provides a definition of ‘incompetence’ that limits this term to what is objectively significant incompetence. It explicitly excludes conduct that is less than best practice, or a matter of policy about which reasonable public officers or public bodies may disagree. It is defined by reference to the ‘reasonable public officer or public body’, and limited to conduct that would not be engaged in by such a person, assuming that they have the skills and knowledge reasonably expected of such a person or body, and assuming that they have taken appropriate steps to obtain

adequate resources, information and advice. This means, for example, that a person who engages in significantly objectively incompetent behaviour as a result of wilful ignorance will have engaged in unsatisfactory conduct if the conduct results in one of the four negative outcomes. Where the conduct is of a kind that reasonable and properly informed public officers may have differing views depending on their views on the merits of policies and appropriate priorities, this will not be unsatisfactory conduct.

As a kind of improper conduct, unsatisfactory conduct can be reported under the whistleblower protection provisions, but as it is less serious than corrupt conduct, the ICAC will generally refer it to another body for investigation. If referral is not appropriate, the inclusion of unsatisfactory conduct within the definition of improper conduct at clause 9 means that the ICAC has the ability to investigate the allegation itself.

In order to preserve the independence of the judiciary (including persons performing coronial functions), the ICAC cannot investigate mere unsatisfactory conduct of judicial officers performing their judicial functions. Issues may exist as to whether these kinds of limitations for judicial officers should also apply to politicians.

13. **Meaning of *anti-democratic conduct***

This clause defines a further kind of ‘improper conduct’, meaning certain offences in relation to elections and the electoral process. It allows the ICAC to investigate conduct which amounts to an offence under the *Electoral Act* and electoral provisions in the *Local Government Act* that are capable of broadly undermining democratic processes in the Territory. It excludes offences such as an individual defacing their own ballot paper, which do not have this broader impact. Offences relating to affecting the reputation, power, influence, or resources of a political party or a candidate for an election are included, meaning matters such as improprieties in relation to political donations or techniques such as push polling are matters that are intended to fall within the ICAC’s jurisdiction. More broadly, offences that are intended to improperly influence voting behaviour are also included, even if the conduct is not being engaged in to advantage or disadvantage a particular party or candidate (for example, if it is engaged in for other, ideological reasons).

Subclause (2) reflects the fact that some electoral offences are part of a course of conduct that may commence before a political party is formed or a candidate is nominated. The conduct relating to the offence that occurs prior to the party being formed or the candidate being nominated is within the ICAC’s jurisdiction.

14. **Meaning of *public body* and *public officer***

This clause defines the terms ‘public body’ and ‘public officer’. These terms are essential to confining the ICAC’s jurisdiction to the Territory public sector. Most types of improper conduct can only be investigated if they are engaged in by a public body or public officer. In addition to all bodies that are clearly public sector bodies, such as Agencies, public bodies include statutory bodies, the Legislative assembly, local government councils, courts and tribunals, bodies where the majority of members are appointed by the Administrator or a minister, government owned corporations, nursing homes, public hospitals, and universities. Public bodies also include private entities that are performing public functions on behalf of the Territory, or that are supported directly or indirectly by government funds or other assistance – this means that NGOs that are recipients of government grants can potentially be investigated by the ICAC.

The term ‘public officer’ primarily refers to persons who are members, officers, or employees of a public body. It also includes a minister, an MLA, a judicial officer, and officers appointed to statutory roles. Subclause (2) (f) extends the definition of public officer to persons to be engaged by a public officer to perform official functions. This includes electorate officers and ministerial advisors. Electorate staff are employed on contracts under the *Contracts Act* and perform official functions in relation to MLAs, who are public officers listed at subclause (2) (b). The contracts are issued by the Department of the Legislative Assembly. Ministerial Officers are employed on contracts under the *Contracts Act* by Department of the Chief Minister, and these comprise the staff of the Office of the Chief Minister and the Office of the Leader of the Opposition. Ministerial Officers are defined in the contract as ‘being a person employed on a fixed term contract in the personal service of a Minister or the Leader of the Opposition or Independent Member of the Legislative Assembly but does not include an Electorate Officer employed pursuant to Speaker’s Determination number EO2 of 2017.’

Subclause (3) excludes persons who are tasked with investigating the ICAC (Inspector, an Acting ICAC appointed to investigate the ICAC, their staff etc.) from being public officers, to ensure that there cannot be cross-investigations.

A number of terms used in this clause are defined at subclause (4), namely the definitions of a ‘court’, ‘nursing home’, ‘public hospital’, and ‘university’.

Part 2 – Establishment, Powers, Functions

15. Establishment of ICAC

This clause creates the statutory role of the ICAC. The appointment, powers, functions, and duties of the role are detailed throughout the Bill.

16. Functions

This clause defines the ICAC's functions.

Subclause (1) reflects that while conducting investigations form a substantial part of the ICAC's functions, conducting investigations is not an end in and of itself. The ICAC's functions therefore extend to a wider range of activities designed to deal with improper conduct. The ICAC is able to gather intelligence, develop and deliver education and training, audit or review practices, policies and procedures, make recommendations and give advice, make public comment, and refer matters as required. Protecting whistleblowers is also an essential part of the ICAC's functions.

Subclause (2) clarifies that the ICAC has jurisdiction to investigate all kinds of improper conduct, but is expected to primarily focus on matters involving corrupt conduct and serious anti-democratic conduct. It expresses the intention that the ICAC should refer matters that are not its primary focus to another appropriate entity, unless there is a good reason for the ICAC to deal with the matter. Referrals are dealt with more comprehensively at clauses 23-28 of the Bill. The term 'serious' in relation to anti-democratic conduct carries a common sense meaning.

Subclause (3) is directed particularly towards distinguishing when offences against the ICAC legislation are to be referred or investigated by the ICAC. Clause 9(1) (e) provides that improper conduct and hence the ICAC's jurisdiction extends to offences against the ICAC legislation, which notably includes retaliation against a whistleblower, failure to comply with a notice etc. Some of these offences may be appropriate to refer, and some may not, and the matters noted in subclause (3) are likely to be relevant for drawing this distinction.

Subclause (4) is a standard clause that clarifies that the ICAC has broad discretion as to how it carries out its functions, subject to any limitations imposed by the legislation.

17. Powers

This is a standard clause that ensures the ICAC is conferred with sufficient powers to carry out its functions.

18. ICAC to act in the public interest

This clause specifies that the ICAC must act in the public interest, and requires the ICAC to consider a framework of relevant considerations, which are detailed in Schedule 1 of the Bill. These relevant considerations include principles relating to fairness and impartiality, upholding the rule of law, separation of powers, cultural sensitivity, deterrence of improper conduct, avoiding prejudice to prosecutions, the impact of the ICAC's activities on the delivery of essential government services,

the need for the ICAC to target its resources most effectively, and public interest factors relevant to whether a matter should be dealt with in public or in private.

Subclauses 2 and 3 make clear that these factors are relevant to how the ICAC carries out its functions but do not, in and of themselves, create rights which give rise to any civil cause of action. They provide a framework for the ICAC and the ICAC's staff to exercise discretions under the Bill, and guidance to the courts if judicial review of administrative action by the ICAC is sought. They will also inform the Inspector's evaluation of the ICAC.

It should be noted that the ICAC must only consider the Schedule 1 factors the ICAC considers relevant. It is intended that the ICAC be guided but not rigidly bound by the framework of considerations in the Schedule. It is not intended that the Schedule create any presumptions, except with respect to the privacy of investigations. Clauses 19 and 61 also emphasise that the ICAC's discretion to determine which matters are pursued, prioritised, investigated, or referred is not to be subject to external control or review, unless the ICAC acts outside of its statutory powers.

19. Independence of ICAC

This clause provides that the ICAC alone may decide how it will carry out his or her functions (provided, of course, that the decisions are in keeping with the Bill and other laws). Even though there will be a Minister responsible for the ICAC Bill, the Minister will not be able to direct the ICAC to carry out its functions in a particular way, or to prioritise (or de-prioritise) particular investigations. A clause of this nature is standard in provisions establishing independent statutory authorities.

Part 3 – Identifying and dealing with improper conduct

20. ICAC to establish system for mandatory reporting

This clause provides that there will be a system under which public bodies and public officers are required to report improper conduct. The ICAC is to issue directions and guidelines specifying what must be reported and how. This must occur within 6 months of the commencement of the clause.

The clause gives the ICAC some discretion to determine who should be required to report and the process of reporting. For example, the ICAC may specify broad processes to apply across all bodies as a default, but different reporting processes for certain bodies that have particular needs, allowing for processes that fit better with the processes and functions of a given body. It may be appropriate to place reporting obligations only on senior persons, persons with certain responsibilities (eg. financial responsibilities), or persons with a certain level of training. More stringent reporting obligations could be placed for a period on bodies that have had identifiable issues or have higher risks of serious improper conduct. This flexibility will also allow the ICAC to adjust the reporting requirements if too many resources are being consumed with reports of limited value.

Subclause (2)(d) makes it clear that reporting obligations to the ICAC can exist concurrently with other schemes or legislative provisions that impose reporting obligations. For example, under the *Ombudsman Act*, written notice of police complaints are required to be given to the Ombudsman by the Police Standards Command (see s 65 of the *Ombudsman Act*). Subclause (2)(d) ensures the ICAC can still require reports of police corruption to be made to the ICAC, but the general flexibility in clause 20 of the Bill allows the ICAC to work out reporting procedures in conjunction with the Police Standards Command and the Ombudsman. This will allow these entities to work together to devise processes that reduce unnecessary administrative work involved in concurrent reporting obligations.

Legal or policy issues may exist in relation to any mandatory reporting regime for the Supreme Court and the Local Court. Currently, the Bill is drafted on an assumption that the ICAC can be relied on to determine what is, in fact, legally possible and what is practically necessary concerning the judiciary.

21. Audits and reviews

This clause permits the ICAC to conduct audits and reviews of public bodies and public officers. The primary purpose of such audits and reviews will be to gather intelligence to help the ICAC determine fruitful avenues for further inquiries and investigations. The audits and reviews must be for the purpose of identifying whether improper conduct has occurred, is occurring or is at risk of occurring. This clause facilitates the ICAC having an effective own-motion jurisdiction, because it does not require a report of specific improper conduct before an audit or review can be carried out.

An 'audit' implies that the body or officer's conduct is being compared to an agreed upon set of standards, and that data is gathered in line with pre-defined methodologies that would be recognised by professional auditors. An 'audit' is defined in the *Audit Act* to include 'the inspection, investigation, examination or review of accounts and systems'. A 'review' is a looser term that encompasses revisiting records of processes and decisions in order to identify and evaluate what occurred. It is intended that the ICAC can employ a broad range of methodologies to review or audit the actions of public bodies and public officers, and also that the ICAC is not limited to auditing for compliance with systems and accounting standards, but could conduct a review which (for example) explores the

background to the making of a particular decision. To this end, the ICAC has powers under clause 68 to be able to access documents and things in the possession of public bodies and public officers, and to compel public bodies and public officers to answer questions or provide information.

This clause is relevant to the implementation of Recommendation 19 of the Martin Report, that the ICAC be empowered to institute investigations on its own motion. Recommendation 30 of the Martin Report is that the ICAC possess a wide and unfettered discretion to undertake an investigation. It is designed to ensure the ICAC can obtain the information that would justify an own motion investigation.

The audit and review power also relates to one of the dot points of Recommendation 37 of the Martin Report, that the ICAC have the power to evaluate the practices, policies and procedures of a public sector agency and to report to the Assembly with recommendations. This particular recommendation references an audit power in the SA ICAC legislation. That audit power is for the purpose of doing more comprehensive review of the policies and procedures of public bodies in order to report to the Legislative Assembly, and does not enable audits of the Legislative Assembly or a judicial body for this purpose - see section 40(5) of the SA ICAC legislation. There are no limitations on the SA ICAC reviewing other independent bodies. In fact, s 7(1) (d) of the SA ICAC Act is explicit that it is a function of the SA ICAC to evaluate the practices, policies and procedures of inquiry agencies as well as other public bodies, and inquiry agencies are the Ombudsman, the Police Ombudsman, or a person declared by regulation to be an inquiry agency. A policy decision was taken that this broader comprehensive review function should not be one of the NT ICAC's primary focuses, given its size and resources. Instead, the audit and review powers of the NT ICAC should be a preliminary inquiry tool to implement own motions as outlined above.

As such, reporting to the Legislative Assembly is an optional outcome of an audit/review as opposed to a mandatory outcome as in SA. Not all audits / reviews will warrant being made available to the broader public, which is the likely outcome of providing a copy to the Parliament.

In recognition of the independence of the judiciary, the ICAC cannot audit or review the practices, policies or procedures of a court or judicial officer in relation to judicial functions (clause 21(2)). Further, the ICAC is obliged to take the importance of separation of powers and the independence of the judiciary into account when exercising its functions (see schedule 1).

22. Preliminary inquiries

This clause confirms that the ICAC has power to collect, receive, and investigate information that is reported to it concerning potential improper conduct. It also ensures that the ICAC can exercise powers to make inquiries to determine whether a matter can be referred, even if it has not yet been able to ascertain whether the matter meets the threshold for investigation by the ICAC. Together with clause 21, the ICAC is conferred with effective own motion powers to start inquiring into any matter, while clause 29(1) provides a threshold test for exercising the ICAC's more serious coercive powers.

23. Referral to referral entity

This clause allows the ICAC to refer a matter, before or after determining whether the ICAC has jurisdiction to investigate the matter. It is sufficient that the matter 'may involve improper conduct'. Subclause (2) specifies that matters concerning improper conduct by certain persons must be referred to certain limited entities. The limited bodies to whom matters can be referred reflect the

independence of the judiciary and of the Legislative Assembly. Special provisions are made for referrals concerning Police, given the sensitivity of investigations concerning Police misconduct and that existing oversight mechanisms exist for allegations about Police, particularly the oversight of the NT Ombudsman.

This clause also clarifies that the ICAC may refer matters in whole or in part to multiple appropriate entities, and subclause (5) provides that the ICAC may refer a matter to the DPP to seek an opinion or request a person be given an indemnity from prosecution.

There may be issues yet to be resolved about whether this clause should apply to the Northern Territory Civil and Administrative Tribunal.

24. Consultation prior to referral

This clause makes clear that the ICAC can conduct discussions concerning a referral prior to making a referral.

25. Information to be provided with referral

This clause makes clear that the ICAC is both empowered to share information to facilitate a referral, but also to withhold information where appropriate. In particular, withholding the original source of any information may be crucial to protect the identity of a whistleblower, and is consistent with the principles and provisions of whistleblower protection in Part 6 of the Bill.

26. Directions to referral entity

This clause enables the ICAC to oversee a matter that has been referred to ensure that it is properly dealt with. The ICAC may give directions to most referral entities as to how the matter is to be dealt with. For independent entities, the ICAC may require a report on what outcome was taken and the action of such outcomes. This enables the ICAC to ensure that matters are dealt with, and also to better evaluate whether particular entities are likely to deal with referrals appropriately. While the ICAC cannot compel an independent entity to take any particular action in relation to a referral, the ICAC retains the ability to investigate the matter itself and to make public comment in relation to whether a referral was dealt with. If an independent entity fails to investigate a matter it has been referred, the ICAC may decide this gives it good reason to investigate the matter itself, depending upon the seriousness of the matter and the ICAC's priorities and resources.

The Speaker and Deputy Speaker are excluded from independent entities that can be directed in order to preserve the principle of separation of powers, and because in practical terms the Speaker and Deputy Speaker are not in a position to carry out an investigation. The current appropriate body for an investigation would be the Privileges Committee, and it would be inappropriate for the ICAC to direct such a committee.

It is recognised that the Martin Report stated at [477] that: 'I recommend that the Speaker be under an obligation to carry out the investigation and to report to the Commission providing details of the investigation and the result. This would include reporting as to what, if any, action was taken following completion of the investigation. In this situation ... I recommend that the powers of the Commission to reclaim a matter and investigate or to require further investigation apply. In this way the public can be assured that MLAs do not receive any special treatment or protection from investigation and the appearance of independence from political and personal influences is

maintained with respect to matters involving MLAs.’ However, Recommendation 16 of the Martin Report also generally recommends that parliamentary privilege is maintained. An approach has therefore been adopted which places obligations on the Speaker while maintaining parliamentary privilege by providing that:

- the ICAC may investigate a matter even if it has been referred to the Speaker, so if the ICAC had good reason to investigate the matter (for example, it was not satisfied that an investigation into serious misconduct of an MLA had taken place), this could have the consequence of the ICAC determining to investigate the matter itself (see clause 29(2)(b));
- the ICAC may report about matters it has referred, resulting in public pressure for the Speaker or Legislative Assembly to account for what has happened to referred matters and address any concerns that improper conduct is not being adequately dealt with.

27. Referral entity may disclose information to ICAC

This clause ensures that a referral entity can communicate freely with the ICAC regarding a referral, irrespective of whether the referral entity would otherwise be bound to keep the information confidential, or restricted from disclosure by privacy laws. By including ‘potential referrals’, the clause permits information sharing between the referral entity and the ICAC in order to determine whether a matter is suitable for referral and what might happen if a referral occurred.

28. Withdrawal or suspension of referral

This clause allows the ICAC to require a referral entity to suspend or discontinue dealing with a referral. This could occur if the ICAC is not satisfied that a referral entity is dealing with a matter appropriately, or because the ICAC subsequently receives further relevant information which elevates the seriousness of the referred matter or otherwise places it in a context where the ICAC feels it is better placed to personally investigate the matter, or because it becomes clear that another body is already adequately dealing with the matter, or because information is received which suggests the substance of the allegations are untrue.

The ICAC cannot withdraw or suspend a referral in relation to an independent entity. However, if the ICAC was concerned that a matter referred to an independent entity had not been dealt with adequately, the ICAC could decide to commence its own investigation.

29. Power to investigate.

This clause sets out when the ICAC may commence an investigation. This refers to a formal stage in the ICAC’s processes of responding to improper conduct. When a matter is in the investigation stage, the ICAC has powers it can exercise for the purposes of the investigation beyond its standing powers. For example, it can require people to attend for compulsory examinations.

In order to allow an ICAC to investigate information on its own motion, an investigation does not require that a complaint be made, however this clause does require that there be some rational evidentiary basis for commencing the investigation. In particular it requires the ICAC to be aware of information that, if true, would tend to show that improper conduct has occurred, is occurring or is at risk of occurring. This broad test is framed to avoid the ICAC needing to make any premature decisions as to the credibility of sources, as such judgements may be difficult to make before a matter is investigated. Subclause (3) also clarifies that an investigation may be commenced when it is in possession of information which, if true, may be directly or indirectly connected with improper

conduct or be part of a course of activity involving improper conduct, even if the information does not itself amount to improper conduct. The threshold test is imposed to require that the ICAC has an evidentiary basis to exercise its very significant coercive powers.

To ensure that the ICAC is able to obtain the evidentiary basis to commence own motion investigations, the ICAC can at any time commence an audit or review under clause 21 in order to explore whether there is evidence available that would justify commencing an investigation. During an audit or review, the ICAC has access to premises of and information held by public bodies, and may also require public bodies or public officers to answer questions or provide information. However, in order to exercise the ICAC's more broad ranging powers to require persons to attend for compulsory examinations, or to inspect financial records of deposit holders (which may be private entities such as banks or pawn brokers etc.), the ICAC must commence an investigation.

30. Power to require information and documents for investigation

This clause empowers the ICAC to demand that persons answer questions or produce evidence. This power can only be exercised for the purpose of an investigation which has commenced under clause 29. Subclause (2) requires the ICAC to accord a person procedural fairness by informing them of the nature of the matters about which they will be asked questions or asked to produce evidence, although the ICAC can refuse to do so if providing this information would be likely to prejudice the conduct of the investigation or be contrary to the public interest. For example, the ICAC may be concerned that providing such information would lead to the witness manipulating or destroying evidence or interfering with witnesses. The ICAC may consider that providing such information is not in the public interest if it would reveal the identity of a whistleblower, or for some other public interest reason such as that it would risk the dissemination of highly sensitive government information, commercial in confidence information, or personal information.

Subclause (3) anticipates that this power will usually be exercised by issuing a written notice to a person, but that circumstances will arise where an oral response is required, in which case the requirement may be made orally. If a person is to be required to attend for questioning, a notice requiring such attendance can be issued under clause 32 (or, in the case of a public inquiry, clause 39).

Subclause (4) allows the ICAC to require information by given by way of statutory declaration.

Subclause (5) empowers the ICAC to seize evidence for a reasonable period of time, and to take copies or make extracts, but also requires the ICAC to allow the owner reasonable access to the item. What amounts to reasonable access and a reasonable period of time will depend on all the circumstances. For example, if the ICAC seized a computer system that a witness requires for his or her business, it might be reasonable for the ICAC to retain the system for long enough to make a verifiable copy of the hard drive, and then return to the equipment to the owner. It would probably not be reasonable for the ICAC to simply hold equipment that the owner regularly uses and needs if a copy that would be sufficient for future evidentiary purposes could be made and retained instead.

31. Power to inspect financial records

This clause enables an ICAC to inspect bank accounts and similar financial records for the purposes of an investigation. Many kinds of serious improper conduct involve the exchange of money, and financial records can be an important source of evidence to indicate the nature of a relationship, whether any improper financial benefits have been obtained, and whether a conflict of interest exists.

The ICAC must have a sufficient basis to commence an investigation, but then is able to inspect bank records for the purpose of investigating those allegations. The clause requires the ICAC to record why inspecting particular financial records is relevant to a particular investigation, which will enable the Inspector to review whether the ICAC is exercising this power appropriately.

32. Power to require person to attend for examination

This clause allows the ICAC to issue a notice which requires a person to attend for a compulsory interview, which is known as an ‘examination’. The person may be additionally required to bring documents or other evidence to the interview. The person is generally entitled to know the general nature of the matters about which the person is to be questioned. The ICAC has some discretion as to how much detail it provides the person as to the nature of the questions to be asked. In particular, the ICAC does not have to notify the person as to the nature of the matters about which the person is being questioned if an explanation about such matters would prejudice the conduct of the investigation (eg. may lead to the destruction of evidence or opportunity to prepare tailored answers), or would be contrary to the public interest (eg. may risk revealing highly confidential government information, or may risk revealing the identity of a whistleblower). Subclause (4) empowers the ICAC to require a witness who has attended for an examination to take an oath to answer questions truthfully, to answer questions, and to produce documents and other evidence.

33. Examination to be held in private

This clause provides that examinations are held in private. If the ICAC wishes to conduct what is in effect a ‘public examination’ (which would not be the norm), it must initiate a public inquiry under clause 37. Clause 39 allows the ICAC to compel persons to attend the equivalent of an examination for a public inquiry.

34. Legal or other representation

This clause sets the test for whether a person is permitted legal and non-legal representation if they are required to attend a compulsory examination. The intention is that while the ICAC has some discretion, if the proposed representative is a legal practitioner, the representative must be permitted to attend in most circumstances. Legal practitioners can help safeguard a person’s rights and are bound by strict professional duties. A request can be refused if the ICAC believes on reasonable grounds that the presence of the legal practitioner would prejudice the investigation or be contrary to the public interest.

The Martin Report discussed legal representation in the context of public hearings (see para [407]-[408]). Section 127 of the Vic IBAC Act deals with the issue where the IBAC may have good reason to refuse that a specific legal representative be present. The test in the Victorian Act has been used as a basis for clauses 34 and 42 of this Bill. Clause 42 sets out the test for whether legal representation is permitted during a public hearing, whereas this provision relates to examinations conducted in private.

35. Interpreters

This clause clarifies that while it is contemplated a witness who would be assisted by an interpreter may have an interpreter, there are circumstances in which the ICAC may refuse use of a particular interpreter. These include when the presence of the interpreter would prejudice the conduct of the

investigation or otherwise be contrary to the public interest. The ICAC is obliged under Schedule 1 to consider the need for ‘cultural sensitivity and the reasonable accommodation of persons with special needs’, however there can also be competing demands which make it difficult to use an interpreter. Evidence may need to be gathered as a matter of urgency and a suitable interpreter may be unavailable. Interpreters, particularly from small language communities, may have relationships with witnesses and subjects of investigations which may raise concerns about witnesses being intimidated or information leaking. While interpreters are often professionals or para-professionals who are trained to adopt professional standards and often successfully interpret in scenarios where conflicts arise, there is not always a trained interpreter available, or sometimes the conflict is such that it raises concerns for the witness or the ICAC despite the interpreter’s skills and qualifications. It is assumed that the ICAC will recognise the importance of using an interpreter where this is needed to obtain the most accurate and reliable evidence, and in particular to allow a subject of an investigation reasonable opportunity to obtain an interpreter so that the person may understand the process taking place and how it may impact them. Under Schedule 1, the ICAC is obliged to act fairly and impartially in carrying out an investigation.

36. Joint investigations

This clause empowers the ICAC to enter into agreements to conduct joint investigations with another entity. This may be appropriate where allegations span both corrupt conduct that the ICAC is best suited to investigate, and other kinds of conduct where another entity may have specialist expertise. For example, the ICAC could potentially carry out a joint investigation with a body like the Ombudsman, where the ICAC targets particular serious incidents of corruption, and the Ombudsman investigates the systemic and cultural issues that allowed the improper conduct to occur. In some investigations, the ICAC may wish to conduct an investigation jointly with the public body in which the improper conduct occurred. This may particularly be the case where the public body has an auditor or internal professional standards unit that could carry out much of the investigation and would bring detailed knowledge of the organisation.

The clause sets out some key matters that need to be considered and agreed upon in order to conduct a joint investigation, including respective responsibilities of the organisations, proposed timelines, and information sharing arrangements. It clarifies that it is expected that an agreement can be terminated with notice. Subclause (5) is intended to protect a future prosecution in the event that evidence was gathered contrary to the terms of an agreement or if a joint investigation agreement breaks down. During a criminal trial, evidence can be excluded on the basis it was unlawfully obtained, and subclause (5) is meant to clarify that mere failure to adhere to the terms of a joint investigation agreement does not make the gathering of evidence unlawful or inappropriate.

37. Public inquiries

This clause empowers the ICAC to hold a public inquiry. A public inquiry can only be held ‘for an investigation’, which means it must be an appropriate way of conducting an investigation in the ICAC’s view. The decision whether a public inquiry is an appropriate way to conduct an investigation is to be determined in accordance with clause 5 of Schedule 1. This provides that matters should be dealt with in private unless it is in the public interest to do otherwise, and sets out a range of relevant considerations for the ICAC to take into account.

Schedule 1 factors that tend in favour of conducting a public inquiry include:

- the desirability of the public sector being open and accountable to the public;

- the benefit of exposing improper conduct to public scrutiny;
- if allegations of improper conduct are already substantially in the public domain and raise issues of continuing public interest;
- the educational value and benefit to research and policy development of sharing details of matters about which the ICAC has particular knowledge (although this factor may be more relevant to releasing a public report rather than conducting a public inquiry).

Schedule 1 factors that tell against a public inquiry include:

- avoiding prejudice to current and possible future prosecutions;
- the impact of the ICAC's activities on investigations by law enforcement agencies, current and possible future legal proceedings, or the ability and capacity of the public sector to carry out critical or front-line services;
- if allegations of improper conduct (which may only be allegations and not be true) are not yet a matter of public knowledge or raise limited wider issues of public interest;
- the risk that a person may suffer undue hardship, including undue prejudice to the person's reputation; and
- protecting the identity and wellbeing of whistleblowers and other persons who have assisted the ICAC.

The ICAC may also take into account any other circumstances it considers relevant, including prioritising resources, and any views expressed by persons who would be affected by a decision whether to handle a matter in private or public.

A public inquiry requires a public announcement as to the general scope and purpose of the inquiry, and the time and place of the inquiry. While it is possible that an investigation may be able to be dealt with almost entirely through a public inquiry, it is also possible that a larger investigation has one or more 'public inquiry phases' to address particular allegations within the context of that larger investigation. A public inquiry may involve things such as questioning witnesses, and hearing submissions concerning evidence before ICAC or recommendations that the ICAC may wish to make.

38. Public inquiries generally to be open to the public

This clause clarifies that the default position for a public inquiry is that it be open to the public, notwithstanding that investigations are usually conducted in private.

39. Power to require attendance

This clause imports the powers in clause 32 (dealing with requirements to attend) with the necessary modifications. Essentially, it should be read as repeating clause 32, but as though the word 'examination' is replaced with the words 'public inquiry'. This empowers the ICAC to require a person to attend and give evidence on oath.

40. Appearance generally

This clause gives the ICAC broad discretion to determine that certain persons or bodies may participate ('appear') in a public inquiry. The ICAC may allow persons or bodies to participate where the ICAC considers this 'appropriate'. Hence, it would be possible for a community group with an interest in the outcome of an investigation but no legal standing in the usual sense to be allowed to

appear. However, the ICAC may need to limit who is able to appear at a public inquiry in order to keep an inquiry focused and avoid consuming undue resources, bearing in mind the purpose of the inquiry and related investigation. A person who appears may make submissions and, with the ICAC's approval, examine or cross-examine witnesses.

41. Right of response if adverse allegations made

This clause ensures an element of natural justice or procedural fairness to a public inquiry. A public inquiry does not necessarily result in any adverse outcome to a person's legal rights, which can limit their ability to rely on natural justice to protect themselves. Merely revealing the ICAC is investigating allegations in a public inquiry may result in substantial reputational damage. If such allegations are made against a person, the ICAC must have the person or body a reasonable opportunity to respond to the allegations. It is up to the ICAC whether the response is to be given in person or orally.

42. Legal or other representation

This clause sets the test for whether a person is permitted legal and non-legal representation if a person is a witness or otherwise appears at a public inquiry. It mirrors clause 34 (which deals with investigations that are not public).

43. Interpreters

This clause mirrors clause 35, but for public inquiries.

44. Directions for private hearing and non-publication

Even though the ICAC may deem it appropriate to conduct a public inquiry, circumstances may arise where evidence or submissions concern a topic which is particularly sensitive. In addition, the ICAC may wish to hold a 'closed session' (see clause 78(4)) in which arguments can be made about the application of privilege, or to discuss whether a certain line of questioning would be within the scope of the inquiry, similarly to the concept of a *voir dire*.

This clause also provides the ICAC with the power to make directions concerning non-publication, and the power to exclude particular persons from a public inquiry, even though the inquiry may generally be open to the public.

45. General report

Clauses 45 to 56 set out a framework for the ICAC to make reports, provide briefs of evidence, and public statements concerning relevant matters.

Under clause 45 the ICAC can make broad reports on matters of concern that may not arise out of a particular investigation. For example, the ICAC can report on the results of an audit or review, on systemic issues that appear to be occurring across government, or to raise issues about matters that may be impacting the ICAC's ability to carry out its functions.

46. Publication of general report made to Speaker

This clause applies when a general report under clause 45 is made to the Speaker, as opposed to being privately made to a public body or public officer. It provides the process for making general

reports public. The Speaker is required to table the report within 6 sitting days. In the event that the ICAC considers the report warrants more urgent publication (as 6 sitting days could, in some cases, be a period of up to approximately 2 months), the ICAC may recommend that the Speaker make the report publicly available immediately, and the Speaker is able to publish the report, which then attracts parliamentary privilege. This provision is modelled after a similar provision in the NSW ICAC Act.

47. Investigation report

This clause allows the ICAC to make reports on the findings and progress of an investigation. An investigation report may optionally include recommendations within the meaning of clause 52, although recommendations may also be made separately from an investigation report. An investigation report may essentially offer conclusions on whether improper conduct has occurred, and hence includes an obligation that due process be followed by requiring that a person be given opportunity to respond to adverse material and to include a fair representation of the response in the final report.

An investigation report is distinct from a brief of evidence in the following ways:

- an investigation report will likely only summarise the evidence rather than include it;
- an investigation report is likely to be a narrative with conclusions;
- an investigation report must be consistent with an obligation to seek a response to adverse material and fairly represent that response; and
- if the investigation report is to be delivered to the Speaker or Deputy Speaker (and hence be tabled publically) it is not to contain answers given in coercive interviews but may contain answers given in a voluntary context (see clause 56 and clause 79(2) (b)).

48. Brief of evidence

This clause allows the ICAC to provide a brief of evidence to an appropriate body for the purpose of pursuing criminal or disciplinary action against a person. Clause 56 does not apply to a brief of evidence, meaning that it may contain evidence obtained during coercive examinations.

49. Public inquiry report

This clause requires the ICAC to provide a report on a public inquiry within three months of the conclusion of the public inquiry. This may be similar to an investigation report, or it may be more appropriate to provide a status update on the progress of the matter. Clause 56 limits the material that can be included in this report, although it should be noted that clause 56 permits material that is already in the public domain to be included, which may be the case with answers given at a public inquiry, even where answering questions was compulsory. Additional public inquiry reports can be provided, which may be appropriate if the report within three months is only a status update, or only dealt with some aspects of the matters explored by the public inquiry. Public inquiry reports are given to the Speaker, who is obliged to table the report the next sitting day after it is received.

Clause 49(3) requires the ICAC to refrain from making ultimate findings about a person's culpability which might interfere or conflict with a criminal or disciplinary process. Questions of whether a person should be found guilty of an offence or disciplinary matter are inherently questions that must

be decided by the correct process—eg. trial by jury, or a relevantly constituted disciplinary panel limited to certain evidence. The ICAC’s role as an investigatory body is to unearth relevant evidence to allow such processes to operate effectively, not to usurp the role of those bodies. Criminal and disciplinary processes have specific safeguards which take into account that their focus is to make decisions that have severe consequences for individuals, including potentially deprivation of liberty. Similar provisions are found in equivalent legislation (see for example section 74B of the NSW ICAC Act, and section 162(6) of the Vic IBAC Act).

50. Report to Minister concerning referral

This clause provides a way of escalating a matter if a referral entity has not adequately dealt with a referral. The ICAC can escalate the matter to the appropriate Minister for that public body or public officer, or otherwise to the ICAC Minister.

51. Report to Assembly concerning referral

This clause provides that if a matter has been referred to a Minister under clause 49, and the ICAC takes the view that a referral has not adequately been dealt with, the ICAC may further escalate the matter to the Legislative Assembly. This is done by providing a copy of the report to the designated Legislative Assembly Committee (or, in the absence of such a Committee, the Speaker). The report must be tabled by the Committee or the Speaker within 6 sitting days. Note that the ICAC also has the ability to withdraw a referral under clause 28 (if the referral entity was not an independent entity), or can simply commence its own investigation into the referred matter under clause 29.

52. Public statements

This clause makes it clear that despite the provisions of the Act that emphasise privacy, it is appropriate for the ICAC to make certain kinds of public statements. This will assist the ICAC to engage in reasonable, limited, public statements to carry out its role and functions, including explanations of its roles and functions. The list is limited because the intention is for the ICAC to avoid as much as possible becoming engaged in public debates about the merits of its activities and recommendations, which might lead to the ICAC becoming politicised or create a perception that it has become politicised.

53. Recommendations

This clause provides that the ICAC can make recommendations in relation to improper conduct. Recommendations can be made at any time—they are not contingent on completing an investigation, and indeed may be a speedier and more effective alternative to conducting an investigation, if the problem can be identified and the public body is already willing to address it.

The ICAC cannot compel a public body to follow recommendations, however, failure to adequately implement the recommendations or a suitable alternative can trigger an escalation process that can ultimately result in public criticism, so there is an incentive for a public body to follow the recommendations or be satisfied it has a defensible basis for not following the recommendations.

54. Dealing with recommendations

For the purpose of ensuring recommendations are followed up, ICAC may give note to public bodies and officers to provide information about the steps, if any, take to implement recommendations – and seek reasons for not taking the necessary steps. If ICAC is not satisfied with the response it can refer the issues to the responsible Minister. If the matter is already at Ministerial level, the ICAC can skip clause 54 and go to clause 55.

55. Report concerning recommendations

This clause provides that if the responsible Minister has failed to respond to the ICAC's satisfaction, the ICAC may make a report to the ICAC Minister which the ICAC Minister must table in the Legislative Assembly within 6 sitting days.

This clause applies even if the responsible Minister *is* the same person as the ICAC Minister, because the ICAC may wish to provide a slightly different report under subclause (3) in view of the fact this report will be tabled and also may need to be amended to reflect any response from the responsible minister provided under subclause (1). For example, content may need to be excluded in accordance with clause 56.

56. Certain reports and public statements not to contain inadmissible material

This clause limits the use that can be made of information obtained due to the abrogation of the privilege against self-incrimination, in order to better protect the integrity of any related criminal, civil, or disciplinary proceedings that may result. It does not prohibit such information being passed privately to a relevant body for further investigation.

The purpose of subclause (2) is to confirm that subclause (1) does not prohibit *Jones v Dunkel* type inferences being drawn from a party's inexplicable failure to provide relevant evidence.

It should be noted that if evidence cannot be used in criminal, civil, or disciplinary proceedings, the benefits of its inclusion in a public report are extremely limited, and such material carries a high risk of unwarranted prejudice to a future proceeding or reputational damage. These are matters that the Martin Report considered should tell against handling a matter in public. The privilege against self-incrimination is abrogated during an investigation as a tool to help unearth the relevant evidence, but nothing further can be done specifically against a person unless derivative evidence supports taking that course of action.

Clause 56 does not prevent ICAC from making recommendations for remedying improper conduct generally in a report, if this can be done without identifying the inadmissible material. The material can still be referred to in a general or de-identified way and systemic changes can be recommended. The ICAC could, for example, identify in a public report the importance of having particular fraud controls on a particular system without revealing information prohibited by clause 56.

Clause 56 applies to reports made under clause 47 to the Speaker or Deputy Speaker, but not to reports provided to other responsible authorities. The reason for this is the publicity inherent in passing a report to the Speaker or Deputy Speaker. For other public officers, an investigation report is not made publicly, but instead is passed to a relevant authority where any concerns about their conduct may trigger a disciplinary process.

57. Rules of evidence do not apply

This is a standard clause for this kind of body that allows the ICAC to consider evidence that would not be technically admissible in court, and to give that evidence the weight that the ICAC considers appropriate.

58. Attendance of persons in custody

This clause makes it clear that the ICAC can compel persons in custody to give evidence, and that arrangements must be made that enable a person in custody to attend before the ICAC to give evidence.

59. Order for surrender of passport

This clause enables the ICAC to apply to the Supreme Court for an order that requires a person to surrender their passport. This power is intended to assist in preventing a relevant witness from fleeing the jurisdiction before they can be questioned by the ICAC, and the order can only be applied for when there are reasonable grounds to presume this may occur. Given the significant curtailment of freedom of movement involved, orders can only be issued for a period of one month, and only for up to three months in total.

60. Injunction to refrain from conduct pending investigation

This clause empowers the ICAC to seek an injunction from the Supreme Court to prevent a person from acting in a way that will obstruct an investigation.

61. Exclusion of certain injunctive remedies

This clause prevents a person from obtaining an injunction that would force an ICAC to investigate a matter, to discontinue investigating a matter, or to refer a matter. The clause helps preserve the ICAC's independence.

62. Restriction on access to ICAC premises and protected ICAC information

This clause ensures that the ICAC's premises and information are adequately secure from interference from third parties. The ICAC's premises can only be accessed by consent of the ICAC or by means of an order made by the Supreme Court.

Part 4 – Powers

Note that powers under this Part are exercisable by an ‘authorised officer’, meaning a person appointed under clause 128 by the ICAC to be able to exercise such powers (typically, an investigator working for the ICAC).

63. Power to enter premises of public body or officer

This clause empowers an authorised officer to enter the non-residential premises of a public body, whether or not an investigation has commenced. For example, the ICAC may wish to exercise this power to conduct an audit or make preliminary enquiries, or to follow up on the extent to which recommendations have been implemented or a whistleblower is being protected. If an authorised officer wishes to enter private premises or residential premises of a public body, it must do so using clauses 64 or 65.

64. Power to enter other premises

This clause allows an authorised officer to conduct searches of private or residential premises by consent of the owner or occupier or under the authority of a clause 65 search warrant. It requires the authorised officer to prove their identity by means of an identity card. Clause 129 of the Bill deals with issuing identity cards.

65. Search warrants

This clause empowers an authorised officer to apply for a search warrant. Search warrant applications can be made to a justice of the peace (but noting that section 6 of the *Justices of the Peace Act* provides that Supreme Court Judges, Local Court Judges and various court officials are deemed to be justices of the peace). An application for a search warrant must:

- specify the kind of improper conduct suspected;
- be accompanied by evidence on oath that satisfies the JP there are reasonable grounds for believing there is evidence of that kind of improper conduct on the premises.

This is a similar threshold test to the test in the *Police Administration Act*.

Search warrants must be executed within 30 days of the date on which they are issued.

66. Obtaining warrant by telephone or other electronic method

This clause provides a process, similar to the process in the *Police Administration Act*, by which a warrant can be granted remotely. For example, a warrant could be granted via telephone or other electronic method, which is particularly useful if a warrant needs to be granted urgently and the authorised officer is in a remote location.

67. Entry on Aboriginal land

This clause empowers an authorised officer to enter Aboriginal land without a permit if that is necessary or convenient to perform a function under the Act. Many public bodies in the Territory are located on Aboriginal land or can only be accessed by crossing Aboriginal land.

68. Powers of authorised officers while on or about the premises

This clause provides a list of things that an authorised officer is empowered to do while on premises in accordance with this part (eg. in accordance with clauses 63 or 64, or in accordance with a search warrant). It includes an offence to contravene a direction of an authorised officer. As with a number of similar offences in the Bill, this is a strict liability offence that carries a maximum penalty of 100 penalty units (currently \$15,400).

69. Procedure for retention notices

This clause allows the ICAC to place restrictions on the use and movement of an object without actually seizing the object. This may be appropriate if an object is of a shape and size it cannot be immediately seized, and/or if the ICAC trusts that the owner or person in control of the object is likely to comply with the retention notice. It includes an offence to contravene a direction in relation to a retention notice. Similarly to equivalent offences in the existing *Public Interest Disclosure Act*, it is an offence that carries a maximum penalty of 100 penalty units (currently \$15,400).

70. Search of persons

This clause allows a person on or about the premises entered by means of a search warrant to be searched by the ICAC, including a search of outer clothing, but does not authorise a more intimate search.

71. Power to require verification and further information and documents from persons providing information to the ICAC

This clause clarifies that the ICAC has a general power to ask follow-up questions in relation to information provided to the ICAC, and require confirmation of the reliability of information by means of requiring a statutory declaration. Making statutory declaration necessarily requires that a person give careful thought to the information they are provided and its accuracy. This power is an important tool to deter vague and misleading reports of improper conduct, and to enable the ICAC to direct its resources most effectively.

Subclause (1) (b) gives the ICAC the power to compel a whistleblower to provide follow-up or confirmatory evidence. In determining whether to commence an investigation, it will be useful for the ICAC to be able to require a person who makes a report of improper conduct to confirm the allegations by means of a statutory declaration, and to provide supporting documentation. This subclause enables this to occur prior to commencing an investigation, even if the whistleblower is not a public officer who can otherwise be required to provide such information.

72. Power to require information and documents from public bodies and officers

This clause empowers the ICAC to require a public officer or public body to provide information and documents. This power can be exercised in circumstances other than an investigation, for example to perform an audit or review in accordance with the Bill.

73. Arrangements for access to confidential information

This clause authorises information sharing between a public body or public officer and the ICAC, including ongoing access to database systems. The public body is able to provide such access despite otherwise having confidentiality obligations with respect to databases and systems. This could enable the ICAC to be granted direct access to search government information systems where this would be appropriate, if the relevant public body or public officer agrees.

74. Power to direct public body or officer to refrain from action

This clause empowers the ICAC to direct a public body or public officer not to take an action if it would obstruct the ICAC or prejudice a future investigation. Whereas clause 60 is an application for an injunction which can be sought in relation to any person, directions can only be issued under clause 74 to public bodies or public officers in their capacity as public bodies and public officers. A clause 74 notice does not require court approval. Intentional non-compliance with a notice issued under this section is an offence that carries a maximum penalty of 2 years imprisonment and/or a fine of up to 400 penalty units (\$61,600).

Part 5 – Confidentiality and Privilege

This Part sets out the circumstances in which various usual privileges and obligations of confidentiality are abrogated or modified in relation to the operation of the ICAC.

75. Definitions

This clause defines some terms used in this division: closed session, open session, and representation. See the notes in relation to clause 4 for a discussion of terms defined in the ICAC Bill, particularly the terms relating to public inquiries and privilege

76. Confidential or privileged information

This clause removes certain obligations of confidentiality and secrecy, and certain privileges, which might otherwise restrict the ICAC from obtaining relevant evidence. Some key results of this clause include that:

- a person can give information to the ICAC even if such information is otherwise confidential, meaning that even if information is subject to a contractual confidentiality agreement or is commercial-in-confidence, it can be given to the ICAC;
- the common law concept of public interest immunity is codified so that:
 - o most government documents have to be produced to the ICAC, even if they are confidential – this cannot be the subject of legal argument;
 - o in accordance with the Westminster tradition and consistent with other jurisdictions and the Martin Report’s Recommendations, Cabinet documents cannot be obtained, however:
 - this does not exclude communications with Ministers unless the communications relate to Cabinet business;
 - the test is framed so that documents cannot be excluded by simply wheeling them into a Cabinet meeting – the information must be about the decisions, proceedings, or deliberations of Cabinet;
 - o confidential communications among Australian governments cannot be obtained, as this risks intruding on the activities of the Commonwealth and other jurisdictions; and
- client legal privilege (legal professional privilege) can be claimed by individuals but not by public bodies.

The exclusion of Cabinet documents is consistent with both the Martin Report and all other jurisdictions. Cabinet documents are protected by public interest immunity, a position which was recommended by the Martin Report. However, rather than applying the common law of public interest immunity, this clause provides a statutory test that codifies that test. The intention is to protect those classes of documents which are clearly protected by public interest immunity, but to avoid the resources involved in litigating public interest immunity over a vast array of different situations where application of the common law test is more subjective. The simple categories here are justifiable. The documents excluded by subclause (2) would not be obtained under the common law test, but a range of other documents over which there may otherwise be subject to complex legal argument (eg. documents which could be argued to inhibit ‘frankness and candour’ generally if released) will be unquestionably available to the ICAC. The categories used in subclause (2) closely parallel some of the key protected classes of information in the *Information Act*.

Subclause (3) provides that while the ICAC has full access to matters over which the Territory would be able to claim client legal privilege, it must not make that information available to the public unless necessary to explain or support a finding of improper conduct. This represents a balancing between the ICAC's need to have the maximum information available for an investigation, and protecting the Territory's legal interests. If the privileged information does not demonstrate improper conduct, the ICAC can inspect it, but must keep it confidential.

77. Client legal privilege

This clause makes it clear that a witness can claim rely on client legal privilege (also known as legal professional privilege) in most circumstances. Client legal privilege is removed by clause 76(1) (c) only when the 'person' who holds the privilege is the Territory. That is to say, the Territory's legal advice must be disclosed to the ICAC, but legal advice of individuals and private entities remains protected. Clause 77 also protects legal advice obtained by a person in their capacity as an individual in relation to their conduct as a public officer (eg. if a public officer seeks personal legal advice in relation to allegations they have behaved improperly while working as a public officer, this legal advice remains privileged and does not have to be provided to the ICAC). Note that the meaning of 'witness' is defined in clause 4, and is a broad term referring to any act of providing information for an investigation, not just giving testimonial evidence.

78. Privilege against self-incrimination

This clause abrogates the privilege against self-incrimination, subject to some safeguards and exceptions. The privilege is not abrogated in relation to offences that the witness is currently charged with, as this would offend the 'companion principle' and risk interfering with a court process. The abrogation is also more limited during the open session of a public inquiry, given the potentially enormous reputational damage and prejudice to subsequent criminal proceedings that would be involved in answering such questions in such a forum. In an open session of a public inquiry, a witness only has to answer questions that might incriminate them if the answers would be materially relevant to the alleged improper conduct that is the subject matter of the inquiry.

For example, suppose the ICAC is investigating allegations of bribery of a public officer, and a witness is being questioned about the event where the bribe was offered and taken. At this event, suppose that various persons including the witness were consuming illegal substances. The witness could refuse in the open session to answer questions that would incriminate them in relation to their own illicit drug use, as this is not the subject matter of the inquiry. The witness would be obliged to give a complete account, including of the illicit drug use in a closed session, however the answers in relation to the drug use would be unlikely to become public and could not be used as evidence against the witness if they were then charged with possession of the illicit drugs (see clause 79). The intention is to given the ICAC the tools it needs to investigate improper conduct but in a way that interferes as little as possible with the general operation of the criminal law.

79. Subsequent use of representations made by witness

This clause limits the extent to which evidence gathered through abrogation of the privilege against self-incrimination can be used in a way that would infringe on basic individual rights, but permits use of 'derivative evidence'.

Under clause 79, adverse admissions made under coercive questioning are not admissible in that disciplinary process, unless those admissions are already in the public domain.

The purpose of abrogating the privilege against self-incrimination is not to allow forced admissions to be used in a disciplinary, civil or criminal proceeding. It is to enable derivative evidence to be located and avenues of enquiry to be fully explored, and it is the derivative evidence that can be used in a subsequent proceeding. Hence it is consistent that derivative evidence, but not the coercively obtained evidence, is made available for public consideration with respect to the actions of MLAs.

Subclause (1) limits the use that can be made of answers given in response to the ICAC's compulsory questions. This is an important safeguard when the privilege against self-incrimination has been abrogated. Together with the other subclauses in this clause, it confirms 'direct use immunity'. Not only does this clause prohibit the evidence being used in various proceedings against the witness, when read together with other clauses in the Bill, such evidence must be excluded from public reports, unless the information is already in the public domain.

Subclause (2)(a) provides an exception to subclause (1) where a witness produces a document or other object of real evidence that was not created for the purpose of providing testimony to the ICAC. That object or document can then be used in subsequent proceedings, even if it was part of making a representation to the ICAC, such where business records or a diary note is presented as an attachment to an affidavit. However, what the witness told the ICAC about the document or object (such as the affidavit itself) cannot be led as evidence against the witness in a subsequent proceeding. Subclause (3) further clarifies that if a document was copied in order to be given to the ICAC, the question of whether it has 'come into existence' to give evidence to the ICAC is to be determined by when the original came into existence, not the copy. Hence, if a person copies their business records and annexes them to an affidavit to the ICAC, subclauses (2) (a) and (3) read together permits these annexures to be used in subsequent proceedings.

Subclause (2)(b) also allows the ICAC to proceed by way of giving a witness a caution that makes it clear they are not required to answer questions, in which case subclause (1) does not operate because the evidence has not been coercively compelled. This will be particularly useful if the ICAC conducts a joint investigation with Police, as the usual rules for Police concerning cautioning witnesses in relation to offences can be applied if appropriate (although care would need to be taken to do this thoroughly to avoid later questions of voluntariness arising). It will also enable the ICAC to seek a voluntary response to an investigation report, and make use of the voluntary response in that final, published report. Read in conjunction with clause 56(3), it allows the ICAC to give a person being investigated a chance to comment on a near-to-final report, and then draw a negative inference if no exculpatory explanation is offered, when such an explanation would be expected if it existed, similar to a *Jones v Dunkel* inference.

Subclause (4) clarifies that subclause (1) does not provide 'derivative use immunity', meaning that evidence given under compulsory examination can be used as intelligence to inform further investigation, and evidence located as a result will be admissible (or, at least, it will not be inadmissible as a result of subclause (1)).

Subclauses (5) and (6) read together provide a further safeguard against abuse of the ICAC's powers to conduct compulsory questioning: admissions concerning minor offences that are not themselves improper conduct and that don't raise issues of risks to health and safety cannot be passed on to other authorities for further investigation or scrutiny. The ICAC has the power to conduct coercive questioning because it is important and necessary to effectively investigate improper conduct, but it is not intended to abrogate the

privilege against self-incrimination any more than necessary to serve that purpose. However, in the event that a witness confessed to a major offence or a public health and safety issue, it would not be appropriate for the ICAC to sit on this information. Accordingly, communication of the information to an appropriate authority is permitted, which will allow for it to be used as intelligence to take action to investigate the offence or address the health and safety issue.

80. Parliamentary privilege

This clause clarifies that the principle of parliamentary privilege continues to apply, but that certain activities are not to be construed as interfering with parliamentary privilege. In particular, if an allegation concerning an MLA has been referred to the Speaker or Deputy Speaker, the ICAC remains free to pursue its own investigation into the allegations if this would otherwise be appropriate.

81. Definitions

This clause defines some terms used in this division: claimant, claimant's representative, Clerk, item, privilege, proper officer, and secured item. See the notes in relation to clause 4 for a discussion of terms defined in the ICAC Bill, particularly the discussion of terms concerning privilege.

82. Meaning of the subject of privilege

This clause clarifies the meaning of the term 'privilege' for the purposes of the Bill, since there might otherwise be some ambiguity as to whether certain immunities were privileges. It is an exhaustive definition of the meaning of the term within the Bill. It is relevant to consider the applicability of claims of privilege to the ICAC in light of this clause, and also clause 57 which specifies the ICAC is not bound by the rules of evidence, and clause 76(1) (a) which generally removes the requirement to adhere to secrecy and confidentiality laws.

83. Notice of potentially privileged material

This clause identifies some action the ICAC can take to preserve evidence that may or may not be the subject of privilege. It clarifies that the ICAC can seize and/or copy such evidence, so long as the potential privilege is not infringed (for example, the material is seized but not viewed). This allows evidence such as a computer or the contents of an email account to be seized and held so as to prevent destruction of the evidence, but without prematurely revealing that an investigation is on foot.

At the point where the ICAC intends to inspect the material, consideration must be given as to whether privileged material is likely to be encountered. For example, if an authorised officer intends to view an email account, action might be taken to ensure that emails between a person and their solicitor are not viewed, or emails marked 'Cabinet in Confidence' are not viewed. If the authorised officer has reason to believe a certain document or thing is likely to be subject in whole or part to privilege (but may not be in whole or in part), the authorised officer can notify the person who would claim the privilege that they seek access to the potentially privileged content. The person then has the opportunity to provide non-privileged content, and defend their claim that the content is privileged if the ICAC does not accept this claim.

With respect to parliamentary privilege, even seizure of documents requires notice to be given. This provision is designed to err on the side of avoiding infringing the principle of separation of powers,

as such action would create a risk that an authorised officer doing their job in good faith could inadvertently end up being in contempt of the Legislative Assembly. It is also possible to identify in advance a representative for matters subject to parliamentary privilege, whereas other kinds of privilege may be held by a variety of persons and representatives.

It is noted that in determining the appropriate process for an investigation, the ICAC is required to have regard to the matters in Schedule 1, which include ‘not interfering with an individual’s rights, privileges or privacy, beyond what is reasonably necessary to carry out the ICAC’s functions effectively’.

84. Process for dealing with claim of parliamentary privilege

This clause allows for the ICAC and the Legislative Assembly to agree upon a preferred process for handling materials that are subject to parliamentary privilege. If such an agreement is in place, an authorised officer must proceed in accordance with the agreement.

85. Privilege claims generally

This clause provides a default process for handling evidence that may be subject to parliamentary privilege if no other process has been agreed in accordance with clause 84. It also provides the process for dealing with evidence subject to other kinds of privilege (eg. client legal privilege).

At the point an authorised officer intends to seize an item that is subject to parliamentary privilege, or inspect or view an item that is likely to contain material that is otherwise the subject of privilege, it must notify an apparent claimant of the privilege (clause 83).

If a claim of privilege is asserted, the authorised officer must stop dealing with the document or thing. However, if the authorised officer believes that privilege is being wrongfully claimed (that the privilege claim could not be established in fact and law), then the authorised officer can initiate a process to resolve the dispute. This process involves securing the item and providing it to the Supreme Court. Items in electronic form may be copied, since it would be impracticable to remove server equipment and the like.

86. Application to Supreme Court to determine privilege

This clause sets out the process for making an application to resolve a question of privilege after a secured item is provided to the Supreme Court in accordance with clause 85.

In most cases, the onus is on the person seeking to claim the privilege to lodge an application to establish that privilege. If no application is made within 7 days, the proper officer of the court must give the item to the ICAC. A failure to make an application does not waive the privilege over privileged material, but it does authorise the ICAC to view the material to the extent necessary to determine whether the material is privileged. Where the material is privileged, that privilege continues to apply and the ICAC cannot use the privileged part of an item without the consent of the claimant. This ensures that a person who does not have the resources to make an application to the Supreme Court is not ‘forced’ to waive their privilege, but ensures that the ICAC can continue to access non-privileged evidence and deal with spurious claims of privilege.

In the case of parliamentary privilege, the onus is on the ICAC to make the application within 7 days. The Clerk of the Legislative Assembly is by default able to appear as a representative of the

Legislative Assembly with respect to claims of parliamentary privilege. If no application is made, the proper officer must return the item to the representative of the Legislative Assembly (who is, by default, the Clerk).

87. Determination of privilege claim

This clause provides that the Supreme Court is to determine a claim of privilege made under clause 86. It contemplates that a document may be privileged in whole, in part, or not at all. The Supreme Court cannot waive a privilege that exists. Its role is to determine, as a question of law and fact, whether the claim of privilege has been correctly made. It also provides an incentive not to mishandle potentially privileged evidence in the form of the offence in subclause (7). This offence carries a maximum penalty of 100 penalty units (\$15,400) or imprisonment for 12 months. The person has to deliberately engage in an action that results in mishandling the evidence, and be reckless as to the fact that the action could result in mishandling the evidence.

Part 6 – Whistleblower protection

88. Whistleblower protection principles

This clause provides guidance for interpreting the Bill in order to ensure it furthers its whistleblower protection functions. It clarifies the role of the ICAC and public bodies in protecting whistleblowers, emphasises the importance of confidentiality to whistleblower protection, and notes the common law model litigant principle should inform how related litigation and disciplinary processes are handled.

89. Meaning of protected action

This clause defines the term ‘protected action’, which means reporting improper conduct in accordance with this Act or otherwise assisting the ICAC.

90. Meaning of protected communication

This clause defines the term ‘protected communication’, which means reporting improper conduct in accordance with this Act. Making a protected communication is a kind of protected action as defined by clause 89. Essentially, a whistleblower is a person who makes a protected communication. Under the *Public Interest Disclosure Act*, the equivalent to a ‘protected communication’ is a ‘disclosure’.

Subclause (1) clarifies that the communication is only a protected communication if it is made to certain persons or bodies, including ‘nominated recipients’, who are persons designated by public bodies to accept protected communications.

Subclause (2) clarifies that the communication is only a protected communication if it is about certain subject matter. Generally, the communication must tend to show that improper conduct has occurred, is occurring, or is at risk of occurring. This is a relatively low bar. There is no restriction, for example, on reporting hearsay information or credible rumour. Further, subclauses (2) (b) and (2) (c) broaden the content of a protected communication to include information that would assist the ICAC to perform the ICAC’s functions or would otherwise assist in the administration of or achieving the objects of the Act.

Subclause (3) clarifies that a disclosure's validity is not affected by matters such as whether the protected communication is made orally or in writing, whether it is made anonymously, or whether the person states that they are making a protected communication. However subclause (4) provides that subclause (3) can be varied by the ICAC's guidelines for mandatory reporting issued under clause 20.

91. Declaration of protected communication

This clause provides the ICAC with the power to declare an action that was not a protected communication to be treated as a protected communication. The definition of what is and is not a protected communication is quite technical, and it is anticipated that sometimes people will honestly try to report what they believe is improper conduct, but report in a way or including details that do not meet the definition of a protected communication. In those circumstances, it may be appropriate for the ICAC to be able to declare that the person's report is to be treated as a protected communication.

From the point in time that the declaration is made and comes to the attention of the relevant person or body, the declared protected communication must be treated as a protected communication. Retaliation against a person for making the communication is then prohibited.

92. Meaning of engage in retaliation

This clause clarifies what conduct is prohibited in relation to a person who has taken protected action. It covers causing harm or threatening to harm a person in retaliation or with the intent to deter a person from taking protected action. Harm is defined broadly to include not only physical and mental harm, but injury loss, damage, intimidation, harassment, and adverse treatment in relation to employment, career, profession, trade or business. This definition is used throughout the whistleblower protection framework, and particularly forms the basis for the offences of retaliation in clauses 97 and 98, the claim for compensation that can be made under clause 99, and for an injunction under clause 100.

93. ICAC to issue directions and guidelines for dealing with voluntary protected communications

The ICAC is required under this clause to issue guidelines to the persons and bodies who receive voluntary protected communications. These may be guidelines that are made separately to or together with the mandatory reporting guidelines issued under clause 20.

94. Nominated recipient

This clause defines who can be nominated by a public body as the recipient of a voluntary protected communication. The person must be a public officer with suitable skills and training for the responsibility of accepting protected communications. This role involves being able to identify whether a communication meets the definition of a protected communication and providing the required information under clause 95. Additional skills and qualifications are not mandatory, but since such a person will be the point of contact for whistleblowers, it is anticipated that nominated recipients would understand the public body's existing mechanisms for reporting and dealing with improper conduct and be able to assist the whistleblower to understand their options and, where appropriate,

to take steps to ensure the public body takes action to deal with the improper conduct or minimise risks of retaliation.

95. Information to be given to protected person

This clause is designed to ensure that clear records are kept of when protected communications are made, and that a protected person and the recipient of the communication have a mutual understanding of the communication that has been made.

96. Protection from liability for taking protected action

This clause enables whistleblowers to report improper conduct and assist the ICAC without fear of breaching a confidentiality requirement or being held civilly or criminally liable for doing so. However, it is only the protected action which is protected. If a person confesses their own improper conduct to the ICAC, this clause does not protect them from the consequences of being held liable for their improper conduct.

97. Offence to engage in retaliation

This clause provides that it is an offence to engage in retaliation (see clause 92 for the definition of retaliation). The clause provides for differing fault elements depending on whether the harm is actual harm or a threat to cause harm, since the ulterior intent in the two situations is different. The crucial element is the offender's state of mind, in that the offender must intend the victim to fear the threat would be carried out or was reckless as to whether the victim actually did fear the threat would be carried out. Whether the victim was actually successfully discouraged by the threat is irrelevant to proving the charge.

If a defendant charged with this offence raises the possibility that their conduct was otherwise legal and was taken for a reason other than the prohibited reason, the prosecution must negative this possibility in order for the defendant to be found guilty. A defendant can also claim that they believed that the 'protected action' was comprised of false or misleading information, although this belief has to have been held on reasonable grounds.

The limitation period for charging this offence is 2 years after the offence is alleged to have been committed.

The penalty for retaliation reflects the existing penalty for the equivalent offence under s 15 of the *Public Interest Disclosure Act*. It carries a maximum penalty of 400 penalty units (\$61,600) or 2 years imprisonment. While 400 penalty units would more often align with a penalty of 4 years imprisonment, the penalty chosen reflects a further consideration. Coercively obtained evidence can be led in criminal proceedings for offences against this Bill, and a policy decision has been made to avoid such evidence being admitted into proceedings for an indictable offence. Additionally, no equivalent offence in the whistleblower schemes of other jurisdictions carries a penalty for more than 2 years.

98. Offence to engage in retaliation in the course of management

This clause provides an additional offence of retaliation which can be charged in the alternative in circumstances where retaliation is by a manager against a person under their management, supervision or control. This offence aims to better assign liability and bring relevant evidence before the court when there is a dispute about whether the 'retaliation' was appropriate management action or retaliation for making a protected communication. Where adverse management action is taken as a reasonable way of carrying out the manager's roles and responsibilities, this is a complete defence to an offence charged under this clause, and there is no need to scrutinise the manager's motives further. However, it is the manager who is required to prove this defence on the balance of probabilities. The limitation period for charging this offence is 12 months after the offence has been committed. The shorter limitation period (compared to clause 97) ensures that a defendant is not left with the onus to prove a defence about a matter too far in the past to be remembered accurately.

As this offence is essentially a variation on the circumstances of the offence at clause 97, and is no more or less seriousness, the same penalty has been applied. The offence carries a maximum penalty of 400 penalty units (\$61,600) or 2 years imprisonment.

99. Compensation for retaliation

This clause enables a person to seek compensation for retaliation. The clause is similar to the existing section 16 of the *Public Interest Disclosure Act*, however also additionally provides that a claim may be brought in the small claims jurisdiction of the Northern Territory Civil and Administrative Tribunal.

Subclause (4) allows the court to consider matters akin to contributory negligence in awarding damages. The purpose of this subclause is both fairness and to provide an incentive to all parties to behave reasonably and take steps to prevent or mitigate potential harm related to retaliation.

100. Injunctive remedies for retaliation

This clause provides that person can also seek an injunction to prevent retaliation or take action to remedy harm suffered as a result of retaliation. An injunction can be sought by a victim or prospective victim of retaliation, or by the ICAC. An interim injunction can also be sought.

101. Facilitating access to justice for victims of retaliation

This clause modifies some default rules that would otherwise apply to court or tribunal proceedings in relation to civil proceedings concerning retaliation. They provide consideration must be given to keeping proceedings confidential, and limit costs being awarded against a victim of retaliation unless a claim was brought vexatiously or the costs relate to the victim being unreasonable. Subclause (4) also clarifies that in proceedings related to retaliation, the court can order an apology be made.

102. Vicarious liability for retaliation

This clause provides that a public body can be held vicariously liable for the actions of its employees. In deciding the damages payable by a public body that is vicariously liable, the court or tribunal may consider the steps taken by the public body to minimise the risk of retaliation, including both steps taken in relation to the specific situation, and general actions such as training and developing policies and procedures to prevent or decrease retaliation. The court or tribunal can also take into account the public body's capacity to implement such steps. Where some action has been taken but the action was insufficient, the court may order that damages be reduced proportionately. This clause varies the general position of the law concerning vicarious liability to provide an incentive to public bodies to take steps to minimise retaliation, and to ensure vicarious liability exists even for gross misconduct when this occurs in the course of employment. It is similar to section 105 of the *Anti-Discrimination Act*.

103. Guidelines to minimise retaliation

This clause directs the ICAC to issue guidelines to public bodies and public officers about how to minimise risks of retaliation. The whistleblower protection principles in clause 88 set out that public bodies have primary responsibility for protecting persons from risks of retaliation, whereas the ICAC's role is to provide guidance and oversight to ensure this is done appropriately. Such guidelines will provide a point of reference for determining whether a public body took appropriate steps to prevent retaliation in a claim for compensation.

104. Direction regarding action to protect persons from retaliation

This clause empowers the ICAC to issue directions to public bodies and public officers for the purpose of protecting whistleblowers and other persons who have assisted the ICAC. Matters about which a direction can be made include, but are not limited to, offering a public officer the opportunity to relocate to another role, and take steps to manage risks of retaliation. The ICAC is obliged to consult with the public body before making such an order, except in certain narrow circumstances where the consultation would be likely to increase the risk of retaliation. Subclauses (5) and (6) limit the circumstances where such an order can be made to a body or officer that is not controlled by the Territory and does not represent the Territory. The intention of these subclauses is to limit the extent to which the ICAC can make such directions to contract service providers.

105. Supreme Court may vary or revoke direction

This clause applies when a public body or public officer wishes not to comply with a direction made by the ICAC under clause 104. The public body or public officer may apply to the Supreme Court to vary or revoke the direction. The public body or public officer must satisfy the Supreme Court that there is either an urgent need for non-compliance to protect substantial harm to a person or to essential public interest, or alternatively a case that non-compliance is reasonable to perform essential functions, and appropriate steps have been taken to minimise risks of retaliation that may be caused by non-compliance.

106. Parties and procedure

This clause specifies certain procedural matters concerning an application made under clause 105. It provides that whistleblowers, persons at risk of retaliation, the ICAC, and the Commissioner for Public Employment, may all be parties to such a proceeding. Similarly to clause 101, consideration must be given to keeping proceedings confidential and information may even be restricted from a party if necessary to protect the identity of a protected person, protect a person from retaliation, or to protect the ICAC's investigations. Given the significance of restricting evidence from a party, the Supreme Court:

- has a discretion whether this occurs and only allows it when the Court is satisfied that it is necessary for certain limited purposes; and
- may call upon the Inspector in an *amicus curiae* role, to question witnesses and make submissions that would assist the court to test the appropriateness and validity of the proposed direction in the absence of an affected party.

It should be noted that the party restricted from viewing evidence will in most cases be a public body, or a public officer performing government functions, and so this process is unlikely to infringe on the personal liberty of individuals. Even though the Inspector performs a neutral role and does not represent the missing party, it should be noted that a public body or public officer would be under an obligation to act as the model litigant, and the body or officer's interests are to act in the public interest, which is the interest the Inspector would also be aiming to uphold.

107. Audits and reviews

This clause clarifies that the ICAC's general power to conduct an audit or review extends to audits and reviews for the purpose determining whether a public body is complying with directions and

guidelines relating to whistleblower protection. Similarly to clause 21, the ICAC cannot audit or review a court or judicial officer in relation to the performance of judicial functions.

108. Recommendations

This clause empowers the ICAC to make recommendations to a public body to improve compliance with directions or adherence to the guidelines, or to generally better manage the risks of retaliation. Failure to follow these recommendations can result in reports being made under clauses 54 and 55.

109. ICAC may arrange protection and require police assistance

The ICAC is empowered by this clause to arrange physical protection for a person at risk of intimidation, harassment, or harm. The definition of harm in this clause is narrower than harm for the purposes of defining retaliation. For example, it does not encompass mere adverse action in relation to employment. It is anticipated to only very rarely be needed, and for that reason it is unlikely the ICAC would itself maintain staff who could serve this function. Subclause (2) therefore allows the ICAC to provide the protection by either directing the Commissioner of Police to take action to provide protection to a person, or to engage another person or body to provide the protection. While providing physical protection has significant resourcing implications, it is anticipated that the circumstances where such physical protections are warranted would not arise frequently.

Part 7 – Staffing, Accountability, and Offences

110. Appointment of ICAC

This clause provides for the appointment of the ICAC by the Administrator. A person is appointed as ICAC following a recommendation of the Legislative Assembly. It is anticipated that appointment of the ICAC will follow the same protocol as appointment of a judicial officer, where an appropriately qualified independent panel considers and puts forward a recommendation of a suitable candidate, which the majority of the Legislative Assembly must then approve. The Martin Report recommended that the ICAC be appointed by a panel such as the Judicial Appointments Panel making recommendations to a bipartisan Standing Committee of the Assembly. Whether such a Committee is created is a matter for the Assembly, but this clause means that the Legislative Assembly must at least consider and vote for any proposed appointee. The appointee cannot simply be chosen by Cabinet without the assent of the Assembly.

111. Eligibility for appointment

This clause sets out the criteria for eligibility to be the ICAC. The qualifications recommended by the Martin Report have been adopted. In addition, the clause makes ineligible persons who have a 'recent political affiliation'. The meaning of recent political affiliation is designed to exclude persons who are likely to have ongoing political involvement that might compromise their ability to be and be seen to be impartial, but not to unduly narrow the field to exclude persons who have merely exercised their democratic rights to participate in discussions of matters of politics and policy. If the ICAC is a public officer prior to appointment, the ICAC must resign their role as a public officer prior to being able to exercise any of the powers or functions of the ICAC.

112. Term of appointment

This clause provides that the ICAC can be appointed for a fixed term of 5 years, and optionally for a further fixed term of 5 years.

113. Conditions of appointment

This clause provides that the conditions of the ICAC's appointment are to be determined at the commencement of the appointment and then not varied during the appointment. The ICAC cannot, for obvious reasons, be given 'performance pay'. However, it would be permissible to provide that the ICAC's salary automatically increases annually independent of performance (for example, in line with indexation). The purpose of subclause (2) is to safeguard the ICAC's independence.

114. Leave of absence

In the event that the ICAC requires a leave of absence, for example due to unforeseen personal matters, such leave can be granted by the ICAC Minister.

115. Vacancy in office

This clause provides the circumstances in which the office of the ICAC becomes vacant. This occurs if there is a resignation as set out in clause 116 or if there is an involuntary termination. The ICAC's appointment automatically terminates upon conviction of certain offences, the imposition of a term of imprisonment, or bankruptcy. The appointment also terminates if the ICAC stands for election as a political representative, or if the ICAC ceases to satisfy the eligibility criteria (for example, if the ICAC makes a declarable political donation). Subclause (2) protects the validity of decisions made by the ICAC even if the ICAC was ineligible for appointment at the time—this is essential to preserve the integrity of investigations which would otherwise be valid.

116. Resignation

This clause provides the mechanism by which the ICAC can resign, namely by providing written notice to the Administrator.

117. Suspension and termination of appointment

In addition to the matters which automatically deprive an ICAC of their appointed status set out by clause 115, clause 117 provides that the ICAC may be suspended from duty by the Administrator in certain circumstances. These include physical or mental incapacity, engaging in corruption, engaging in outside employment without approval, or ongoing absence from duty. Suspending the ICAC is a temporary measure. In order to terminate the ICAC, a two-thirds majority of the Legislative Assembly must agree to the termination. This procedure is consistent with the procedure for removing the Ombudsman in section 141 of the *Ombudsman Act*.

118. Acting ICAC

This clause enables the appointment of one or more Acting ICACs. An Acting ICAC may be appointed in relation to a particular, specified matter, which is a provision likely to be utilised when the ICAC has a conflict of interest. Alternatively, if the ICAC is unavailable, or no one holds the role of the ICAC, an Acting ICAC can be appointed as an interim measure to generally act as the ICAC so that the functions of the ICAC under this Bill can continue to be carried out.

An ICAC appointed under subclause (2) is a special appointment for an occasion where there is a need to investigate the ICAC or a member of the ICAC's staff for improper conduct. While most complaints concerning the ICAC will be dealt with by the Inspector appointed under clause 131, the Inspector's powers to investigate are not as extensive as those of the ICAC. A person is only eligible to be appointed as an Acting ICAC under subclause (2) if they are not and have never been a public officer, meaning they themselves are a person who cannot be investigated by the ICAC, avoiding the possibility of the two persons investigating each other. Further, clause 111(1) (d) provides that such an appointee cannot subsequently be appointed as the ICAC for 2 years after the conclusion of their appointment as Acting ICAC. This is to ensure that such an Acting ICAC's views are not coloured or perceived to be coloured by a desire to discredit the ICAC in order to be appointed as the ICAC. It preserves such a person's independence.

To ensure that a government is not tempted to continue to appoint a series of Acting ICACs rather than the standing ICAC role, subsection (4) provides that no further appointments of Acting ICACs can be made after the office of ICAC has been vacant for a period of 18 months. There may be

occasions where a person who holds another role as a public officer may be an appropriate person to be an Acting ICAC to carry out a particular investigation – for example, the appropriate person may also hold a role as an Acting Judge, or be a director of a board that is funded by government grants. There is no reason why such a person should be excluded from being appointed as an Acting ICAC to investigate a matter unrelated to the sense in which they are a public officer. However, it would be inappropriate for an Acting ICAC employed by a particular Agency to be investigating that Agency. Subsection (6) is designed to exclude inappropriate appointments of public officers to the role of Acting ICAC without excluding situations where the appointee is a public officer in another, unrelated capacity.

There may be issues to be further addressed as to whether an Acting ICAC should have the power to deal with judicial officers.

119. Oath before taking office

This clause provides that the ICAC or Acting ICAC must take an oath to perform their role faithfully, impartially, truly, and in accordance with law. It is common for independent statutory officers to take an oath of this nature.

120. ICAC staff

This clause provides a definition of the term 'ICAC staff', and clarifies that it extends beyond persons who are employees of the ICAC's Office as an Agency. It covers seconded staff, consultants, and police officers who are made available by an arrangement with the Commissioner of Police.

Subclause (2) allows a police officer to retain the duties and powers of a police officer while assisting the ICAC, similarly to the equivalent South Australian legislation. Should an ICAC investigation require forced entry onto private premises, or to arrest persons, the ICAC's staff would not necessarily have the specialist training and equipment needed for these kinds of actions, and the ICAC itself does not have a specific power to arrest persons. Such situations can be dealt with by means of making arrangements with the Commissioner of Police to use police officers with suitable training and equipment. It is also contemplated that subclause (2) will allow for a range of appropriate approaches to be considered with respect to defining the chain of command in a joint ICAC / Police investigation of an offence. Subclause (2) may also assist the ICAC in procuring staff with police experience, since a wider range of police officers may be interested in working for the ICAC if this does not require them to give up their status as a serving police member.

121. Staff not subject to external direction

Persons who are defined as ICAC staff in accordance with clause 120 are subject only to the direction of the ICAC by virtue of clause 121 when performing functions under the ICAC Act. This means that when staff are seconded or otherwise made available by arrangement, any conflict of duties is to be resolved in favour of the ICAC. This preserves the independence and integrity of the ICAC's investigations.

122. Delegation

This is a standard clause that allows the ICAC to delegate powers to staff. It does not include the power to delegate the power to delegate, which is also standard.

123. Suitability checks

This clause ensures the ICAC has the authority to carry out background checks on staff and potential staff. Given the sensitivity of the information that staff have access to and the functions they will perform, Checks may extend beyond mere criminal history checks. The concept of a ‘police intelligence or integrity check’ contemplates that the ICAC may have reference to police intelligence concerning a person, including matters that have not resulted in a charge or conviction, and to information that reflects generally a person’s integrity including their associations. Clause 123 contemplates that suitability checks may be carried out on any staff member, although given the intrusive nature of some of these checks they are framed as ‘requests’ rather than ‘requirements’. What checks can be insisted upon for a particular staff member or position will therefore depend on what is necessary for to ascertain for the ICAC to perform its role and functions. When a person is to be designated an ‘authorised officer’, allowing them to exercise the ICAC’s coercive powers, the ICAC is required under clause 128 to satisfy themselves of the person’s suitability.

Subclause (3) clarifies that the ICAC is able to take into account a person’s irrelevant criminal record, and the person’s political opinion, affiliation or activity, even if this would otherwise be prohibited under the *Anti-Discrimination Act*. While the *Anti-Discrimination Act* does allow discrimination where this relates to performing an inherent requirement of the job, the purpose of subclause (3) is to clarify that it is legitimate for the ICAC to consider that political neutrality and a strong commitment to adhering to the law are inherent requirements of working for the ICAC.

124. Handling information regarding suitability

This clause protects the integrity of the process concerning a determination of suitability, and encourages honest and frank consideration of the issues, by requiring strict confidentiality concerning material obtained under clause 123. It should be noted that a consequential amendment to the *Information Act* will also provide an exemption from disclosure under the freedom of information scheme that applies to ICAC information generally.

125. Annual report

This is a standard provision that requires the ICAC to produce an annual report. The clause also specifies that the report must include some required quantitative and qualitative information with respect to the ICAC’s activities. It is anticipated that the ICAC will include as much information as appropriate to explain the meaning of the quantitative data, without revealing confidential information about investigations.

126. Guidelines and practice directions for ICAC staff

This clause requires the ICAC to issue guidelines to ICAC staff and to keep these guidelines up to date. Guidelines must be issued within 2 months.

127. Website

This clause requires the ICAC to maintain a repository of information about its activities and functions that is easily accessible to the public via a website. Such clauses are standard for statutory bodies in contemporary legislation.

128. Appointment of authorised officers

This clause specifies who may be an authorised officer, which is a person appointed by the ICAC to exercise the ICAC's coercive functions. Typically, a person employed or engaged by the ICAC as an investigator would need to be designated as an 'authorised officer' in order to be able to carry out their role. Given the seriousness of the powers exercised by authorised officers, there is a requirement placed on the ICAC to ensure that a person appointed as an authorised officer is suitable for the role.

129. Identity card

This is a standard clause for persons who represent and exercise coercive functions on behalf of a statutory body. It provides that an authorised officer be issued an 'identity card' which persons can view in order to satisfy themselves that a person claiming to be an authorised officer is in fact an authorised officer.

130. Return of identity card

This clause requires a person to return an identity card if they are no longer an authorised officer and makes it an offence not to do so. To provide an incentive to ensure this obligation is taken seriously, a small but significant maximum penalty of 20 penalty units (\$3080) applies to a failure to return the card without reasonable excuse.

131. Appointment of Inspector

This clause creates a statutory role whose function is to oversight the ICAC. The intention is not to create a further ICAC to monitor the ICAC, but to provide that there is an experienced person who can access the ICAC's records to ensure the ICAC is acting within power. This role will also provide crucial oversight to ensure very intrusive powers such as telecommunications intercept activities are not being abused. The Inspector is appointed for a period of up to 5 years and must themselves be someone who would be qualified to be appointed as the ICAC.

132. Functions of Inspector

The Inspector's key functions are to:

- provide the Legislative Assembly with an annual evaluation of the ICAC in accordance with clause 133;
- handle complaints about the ICAC; and
- make recommendations to the ICAC and other public bodies with respect to performing functions under this Bill.

The function of making recommendations offers a valuable opportunity for the ICAC to receive independent suggestions for improvement.

133. Evaluation of ICAC

This clause provides that the Inspector is to conduct an annual evaluation of the ICAC, and that this evaluation is to focus on whether the ICAC has acted within power and in compliance with legislation.

While it is possible for the Inspector to consider the ICAC's conduct more generally, it is anticipated that the Inspector would not engage in a subjective and more broad-reaching assessment of whether the ICAC's approach to matters is preferable. However, the Inspector may wish to deal with issues of particular concern, and follow up on whether recommendations made to the ICAC have been implemented.

134. Report on evaluation

This clause provides that a report on the evaluation must be provided to the ICAC to comment, and then to the ICAC Minister for tabling in the Legislative Assembly.

135. Complaints about ICAC

This clause provides that the Inspector is designated with the function of receiving complaints about the ICAC. In addition, it requires the ICAC to pass any complaints about it to the Inspector within 14 days of receipt. The Inspector has a broad discretion as to how it deals with complaints.

136. Access to ICAC premises and information

This clause empowers the Inspector to access the ICAC's premises and information. It also requires the ICAC and members of ICAC staff to provide reasonable assistance where required.

137. Further powers of Inspector

As a result of an evaluation or complaint concerning the ICAC, the Inspector has several powers. The Inspector may make recommendations to improve processes and procedures, may refer disciplinary matters to the ICAC or another public body, or refer a matter to a law enforcement agency for further investigation. In the event that the Inspector is of the view that an allegation requires further investigation than the Inspector is able to achieve, the ICAC can recommend that the ICAC Minister appoint an Acting ICAC to investigate the ICAC or a member of ICAC staff under clause 116(2). This would by its nature presumably be a serious and complex allegation.

138. Confidentiality of information

This clause requires the Inspector to omit information from a report that is unnecessary for the effective performance of the inspector's functions, particularly if the disclosure could compromise:

- preliminary inquiries, investigations, or referrals
- potential criminal proceedings; or
- the safety and wellbeing of any individual, or cause reputational damage.

139. Inspector's staff

This clause clarifies that the Inspector may have staff consisting of persons who are employed by an Agency but made available under an agreement, and persons engaged as consultants. By the definition of a 'public officer' in clause 14, a member of the Inspector's staff is not a public officer in relation to performing functions for the Inspector, and hence cannot be investigated by the ICAC.

140. Unauthorised disclosure of information obtained in the course of performing official functions

This clause makes it an offence for a person involved in performing functions under this Act to disclose confidential information. As such, this offence could be committed by ICAC staff, but also by persons performing other roles such as officers dealing with referrals, persons who receive whistleblower allegations, and the Inspector.

It is not an offence to disclose confidential information in the course of performing functions under this Act, and in other situations such as staff seeking legal advice or assistance from a health practitioner. It should be noted that the ICAC has the power under clause 142 to even further restrict disclosure of information so that disclosures that are permissible by default under clauses 140 or 141 are not allowed. The intention of the list of permissible disclosures is to ensure the ICAC does not spend undue resources oversighting and approving reasonable requests to disclose information. Nevertheless, the ICAC also has the capacity under subclause (3)(d) to approve a disclosure of information that would otherwise be prohibited under this list.

Where independent entities are conducting their own functions (for example, investigating a matter that has been referred or reported to them under this Bill), they are under an obligation to carefully consider whether disclosure of identifying information (revealing the identity of a protected person) is reasonably necessary to carry out their functions. It should be noted that most independent entities have their own confidentiality provisions, but also good faith provisions to ensure that honest errors of judgement when carrying out their functions does not place them at risk of prosecution.

The penalty for disclosure of confidential information reflects the existing penalty for the equivalent offence under section 53 of the *Public Interest Disclosure Act*. It carries a maximum penalty of 400 penalty units (\$61,600) or 2 years imprisonment. While 400 penalty units would more often align with a penalty of 4 years imprisonment, the penalty chosen reflects a further consideration. Coercively obtained evidence can be led in criminal proceedings for offences against this Bill, and a policy decision has been made to avoid such evidence being admitted into proceedings for an indictable offence. The information being handled under the Bill will include information of extreme sensitivity, including information that may put a whistleblower at risk of retaliation, and it is appropriate that a significant penalty is applicable and aligned with the penalty for the offence of retaliation.

141. Unauthorised disclosure of information in other circumstances

This offence is similar to the offence in clause 140, but it applies to persons who are not performing functions under the ICAC Act. For example, witnesses who provide information may learn confidential information about an ICAC investigation during the course of questioning. This provision makes it an offence to discuss this confidential information other than with a limited list of persons. Similarly to an equivalent South Australian provision, disclosure is permitted not only to the kind of persons listed under clause 140, but also to close family members. If the ICAC deems this would be inappropriate in a given situation, it can issue a direction under clause 142 to prohibit disclosure even to close family members.

The offence carries a maximum penalty of 400 penalty units (\$61,600) or 2 years imprisonment. The penalty for this offence is consistent with the penalty imposed for the similar offences at clauses 140 and 142 of the Bill.

142. Direction not to disclose certain information

This clause empowers the ICAC to direct a person not to disclose information by means of a ‘non-disclosure notice’. It is similar to the power currently provided by section 53B of the *Public Interest Disclosure Act*. It does not prevent a person providing information to a lawyer, doctor, or psychologist for the purpose of seeking legal or medical assistance.

The penalty aligns with similar offences at clauses 140 and 141 of the Bill, and with section 53B of the *Public Interest Disclosure Act*. This is particularly appropriate because the transitional provision at clause 160 provides that s 53B notices issued under the *Public Interest Disclosure Act* essentially ‘become’ notices issued under clause 142 of the Bill at the time the Bill commences as an Act.

143. Failing to comply with requirement for information or documents during investigation

This clause makes it an offence to fail to comply with a direction of the ICAC. As with a number of similar offences in the Bill, this is a strict liability offence that carries a maximum penalty of 100 penalty units. The maximum penalty is 100 penalty units (\$15,400). This penalty is similar to the equivalent offence under section 26 of the *Public Interest Disclosure Act*, which has been sufficient to ensure compliance during the 7 or so years of that Act’s operation. Note that clause 148 is potentially also applicable if the failure amounts to intentional obstruction of an authorised officer.

144. Failing to comply with notice to attend or answer questions or produce things at examination or public inquiry

This clause makes it an offence to fail to attend an examination, answer questions, or give evidence as required by the ICAC. As with a number of similar offences in the Bill, this is a strict liability offence that carries a maximum penalty of 100 penalty units (\$15,400). Note that clause 148 is potentially also applicable if the failure amounts to intentional obstruction of an authorised officer.

145. Failing to comply with direction of ICAC at public inquiry

This clause makes it an offence to fail to comply with a direction of the ICAC at a public inquiry—for example, failing to leave a public inquiry if directed to do so. Consistent with other similar offences in the Bill, it is a strict liability offence punishable by a maximum fine of 100 penalty units (\$15,400).

146. Contravening direction regarding whistleblowers

This clause makes it an offence to intentionally disregard a direction issued by the ICAC under clause 104, being a direction aimed at protecting a person from retaliation. Consistent with other similar offences in the Bill, it is a strict liability offence punishable by a maximum fine of 100 penalty units (\$15,400). In the event that contravention of a direction results in retaliation, the offence of retaliation at clause 97 could be charged, which has a higher maximum penalty. Similarly, if the action obstructed an authorised officer in the performance of functions under this Bill, the offence of obstruction in clause 148 could be charged, which also has a higher penalty.

147. Falsely representing to be authorised officer

This clause makes it an offence to pretend to be an authorised officer of the ICAC if a person is not an authorised officer. It is intended to deter persons from pretending to be an authorised officer in order to misuse their presumed authority. The offence carries a maximum penalty of 200 penalty units (\$30,800) or 2 years imprisonment. For the reasons articulated in these explanatory notes in relation to clause 97, no offence under this Bill carries an imprisonment penalty of more than 2 years imprisonment. The usual practice is that an offence with 2 years imprisonment warrants an equivalent monetary penalty of 200 penalty units, and there seems to be no reason to vary that practice in relation to this offence, as there is no reason to believe this is behaviour which is likely to occur without additional deterrence. A penalty of 2 years imprisonment is a little higher than the equivalent offences in the *Independent Commissioner Against Corruption Act* (SA) at section 53, or the *Independent Commissioner Against Corruption Act 1988* (NSW) at section 95, both of which impose a maximum penalty of 1 year imprisonment. However, it is appropriate in view of the offence of impersonating a public officer at s 86 of the *Criminal Code* (NT), which carries a penalty of 3 years. Section 86 does not already adequately provide an offence for impersonating an authorised officer, since an authorised officer of the ICAC is not necessarily 'employed in the public service' within the meaning of section 86.

148. Obstruction of authorised officer

This clause makes it an offence to obstruct an authorised officer in carrying out their duties under the Act. The conduct prohibited here is broader than contravening a direction under clauses 143-145, although clause 148 is not a strict liability offence, so an intention to obstruct must be proven. Consistently with the equivalent provision in section 52 of the *Public Interest Disclosure Act*, and commensurate with the gravity of the ICAC's functions, the offence carries a maximum penalty of 400 penalty units (\$61,600) or 2 years imprisonment.

149. Misleading information

This clause makes it an offence to provide the ICAC with false or misleading information. The offence is standard in legislation of this nature. The maximum penalty for providing false and misleading information, including false and misleading information in a document is 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.

Part 8 – Miscellaneous matters

150. Protection from liability for acting in an official capacity

This is a standard clause that provides protection from personal liability for person carrying out official functions under this Act in good faith. Civil claims for compensation for injuries suffered can still be brought against the Territory. Subclause (3) clarifies that this clause should not be interpreted to affect Part VIIA of the *Police Administration Act* where this is applicable, being the Part of that Act which provides framework for making civil claims against police members.

151. Evidence in criminal proceedings

This clause gives the court the discretion to require the ICAC to produce its confidential records for a criminal proceeding, where the court is satisfied that this is required in the interests of justice. Before making an order to this effect, the court must give the ICAC a reasonable opportunity to appear and make submissions. The court must further examine the evidence prior to determining whether it makes the evidence available to the parties. This is designed to ensure confidentiality around the ICAC's functions is preserved, but not to the point it would unduly interfere with the administration of criminal justice.

152. Service

This clause provides a range of contemporary methods of electronic service of formal notices, directions, or requests may be used by the ICAC. In addition to the methods provided by the *Interpretation Act*, service by email is provided for (similarly to the current regime in the *Public Interest Disclosure Act*). In addition, if those methods of service fail or are otherwise impracticable, the ICAC has the discretion to authorise service using other methods (eg. via a social media account other electronic process). The Inspector and other persons performing functions under the Act, such as nominated recipients, may also use the methods in subclause (1), but only the ICAC has been given the discretion to permit the methods in subclause (2). It is anticipated that these will not be required by the Inspector, and the discretion to allow service by these methods is best otherwise restricted to when they are authorised by the ICAC, to ensure adequate consideration of their reliability in a given instance.

153. Dealing with unclaimed property

This clause provides for a process for dealing with property that is in the ICAC's possession, is no longer required, and has no apparent lawful owner. For such matters ICAC can seek an appropriate order from a court of competent jurisdiction.

154. Regulations

This clause is a standard clause that provides for regulations to be made. These regulations may include, but are not necessarily limited to, provision for certain registers to be kept by the ICAC, and allowances to be paid to witnesses. This clause should be read with the *Interpretation Act* which contains provisions that sets out the kinds of matters that can be dealt with by way of regulation.

Part 9 – Repeal and Transitional Matters for Independent Commissioner Against Corruption Act 2017

155. Act repealed

This clause repeals the *Public Interest Disclosure Act*. That Act established the Commissioner for Public Interest Disclosures, which investigated corruption in the Territory, but with more limited powers and jurisdiction than the ICAC. The Commissioner for Public Interest Disclosures also administered the whistleblower scheme. A new whistleblower protection scheme is provided by Part 6 of the Bill, so the functions that were fulfilled by the Commissioner for Public Interest Disclosures will be fulfilled by the ICAC when the ICAC legislation commences operation.

It is anticipated that this Division will be timed to commence when the major provisions of the Bill (Parts 1 to 8) become operational.

156. Definitions

This clause defines key terms for the transitional provisions. They are self-explanatory or refer to provisions of the *Public Interest Disclosure Act*, which is being repealed.

157. Protection continues for previous disclosures

This clause provides that whistleblowers under the *Public Interest Disclosure Act* are to be treated as having made a protected communication under the Bill.

158. Current investigations

This clause provides that responsibility for ongoing investigations of public interest disclosures become the responsibility of the ICAC, and that disclosers are to be contacted and notified that the ICAC is now handling their matter.

159. Relocation of public officers

This clause clarifies that if an application for relocation is made before the date that cl 153 commences, the application will be processed, with the ICAC performing the role of the Public Interest Disclosure Commissioner. The ICAC's power to direct public bodies and public officers in order to protect whistleblowers mean that the ICAC also has its own power to assist a whistleblower with relocation if this is needed.

160. Non-disclosure directions

This clause provides a transitional process for non-disclosure directions made under the *Public Interest Disclosure Act*. The ICAC has 6 months to review these directions before they automatically expire. The ICAC has the capacity to issue further directions which 'renew' PID non-disclosure directions as ICAC non-disclosure directions under cl 142.

161. Report about implementing recommendations

This clause enables the ICAC to follow-up on whether outstanding recommendations made by the Public Interest Disclosure Commissioner are followed.

162. Provisions if Act does not commence at start of financial year

This clause provides that if the ICAC Act commences on a date where its first financial year is not 12 months, it issues its first annual report in the following year and covers the period since commencement. This gives the ICAC a reasonable opportunity to set up processes and procedures for gathering the data needed to provide the annual report, and ensures that the report contains at a minimum a full year of data.

Schedule 1

This schedule provides a framework of considerations to guide the ICAC in carrying out functions under the Bill, particularly where those functions involve exercising a discretion.

Schedule 2

This schedule sets out the required information to be provided to a person who makes a protected communication in accordance with clause 95(3), in addition to the matters listed at clause 95(1). This information provides a protected person with basic information about their role and responsibilities, as well as the services and protections available to assist them.

ATTACHMENT D

Independent Commissioner Against Corruption – Frequently Ask Questions

The Territory Government is creating an Independent Commissioner Against Corruption (ICAC) to investigate government corruption, and restore integrity and transparency to Government. Legislation has been drafted and will be introduced into the Legislative Assembly this year. The Government is currently seeking feedback on the draft Bill, which is available at www.justice.nt.gov.au.

This fact sheet is intended to assist you to provide an informed response.

1 What is the ICAC?

The ICAC is a specialist investigator with a focus on government corruption. The ICAC is the CEO of the ICAC's Office, which will be its own Agency for the purposes of government finance.

The ICAC investigates certain kinds of criminal offences that relate to government corruption, and also can investigate serious breaches of public trust that are not technically offences. In addition to the kinds of powers Police have, the ICAC has powers to enter government premises without warrants, and to compel any person to attend and give evidence. The ICAC will also administer a whistleblower protection scheme, which will allow it to protect important sources of information.

2 Who will the ICAC be?

The ICAC will be selected by an independent panel of experts in a procedure similar to that for making judicial appointments. The Bill requires that the ICAC must be a person with substantial legal expertise, such as a former Supreme Court judge or a lawyer of 10 years standing. The ICAC must not have a recent political affiliation, which means they must not be someone who has in the last 5 years been a politician (including at local government level), an office holder or elected representative of a political party, a ministerial staffer, or someone who has made a reportable donation to a political party. If the ICAC holds a role as a public officer at the time of appointment, they must resign from that role.

3 Will the ICAC operate in private similarly to South Australia, or publicly similar to NSW?

The NT ICAC will take a hybrid approach. The Recommendations of the Martin Report were that investigations should be conducted in private as a general rule, and this Recommendation has been adopted. Investigations conducted in private pose less risks and complications to subsequent prosecutions. They also avoid unduly damaging reputations, given that even an announcement that the ICAC is investigating allegations can potentially damage a person's reputation. However, the NT ICAC will be able to conduct a public investigation when it considers this is warranted. There are criteria the ICAC should consider when making the decision whether to go public, which are found in clause 5 of Schedule 1 of the Bill.

4 Does the ICAC replace any existing Territory organisations?

The ICAC replaces the Commissioner for Public Interest Disclosures, and the ICAC Bill repeals the Public Interest Disclosure Act. The ICAC has more substantial powers and a broader remit than the Commissioner for Public Interest Disclosures, as detailed below. The ICAC does not replace any other existing law enforcement or integrity body.

5 How does the ICAC compare to the Commissioner for Public Interest Disclosures?

Key Points	ICAC	Commissioner for Public Interest Disclosure
Same general subject matter.	<ul style="list-style-type: none"> Will investigate improper conduct with a focus on serious corruption. 	<ul style="list-style-type: none"> Investigates improper conduct with a focus on serious corruption.
Bigger budget.	<ul style="list-style-type: none"> Will have annual funding of \$3 million, with the ability to apply for a Treasurer’s advance if needed. 	<ul style="list-style-type: none"> Has annual funding of approx. \$0.7 million, with the ability to apply for a Treasurer’s advance if needed.
Guaranteed financial independence.	<ul style="list-style-type: none"> Independent statutory office, and a separate Agency by law for the purposes of the <i>Financial Management Act</i>. 	<ul style="list-style-type: none"> Independent statutory office, but currently placed within the Department of Attorney-General and Justice for the purposes of financial management.
Own motion powers.	<ul style="list-style-type: none"> Will be able to investigate matters on complaint or of its own motion. 	<ul style="list-style-type: none"> Can only investigate when a whistleblower made a complaint.
Can investigate a broader range of public officers.	<ul style="list-style-type: none"> Will be able to investigate employees, officers, and members of Departments, Local Councils, Police, and statutory authorities. Will be able to investigate MLAs, Ministerial advisors, judges, contract service providers, and recipients of government grants. 	<ul style="list-style-type: none"> Can investigate employees, officers, and members of Departments, Local Councils, Police, and statutory authorities. Cannot investigate judges, some Ministerial advisors, contract service providers, and recipients of government grants. Can only investigate MLAs upon receipt of a referral by the Speaker.
Can conduct public inquiries.	<ul style="list-style-type: none"> Will usually conduct investigations in private, but may conduct public inquiries when appropriate. 	<ul style="list-style-type: none"> Must conduct investigations in private.
Can investigate private individuals involved in government corruption.	<ul style="list-style-type: none"> Will be able to investigate persons who attempt to corrupt public officials (e.g. a private individual who offers a bribe to a public officer.) 	<ul style="list-style-type: none"> Cannot investigate persons who are not public officers, even if they have participated in corruption.
Can investigate anti-democratic conduct.	<ul style="list-style-type: none"> Will be able to investigate corruption in relation to elections. 	<ul style="list-style-type: none"> Cannot investigate corruption in relation to elections.
Stronger coercive powers to obtain evidence.	<ul style="list-style-type: none"> Will be able to require people to attend and give evidence. Persons must answer questions and give sworn evidence. Will have powers to access government premises and records. Will be able to apply for warrants to search private premises, use surveillance devices, intercept telecommunications, and conduct controlled operations. Will be able to apply for an order to seize a person’s passport. 	<ul style="list-style-type: none"> Can require people to attend and give evidence. Persons must answer questions and give sworn evidence. Can only search government premises (not private premises). Can require private individuals to produce evidence. Has no powers in relation to passports.

Independent Commissioner Against Corruption – Frequently Ask Questions

Key Points	ICAC	Commissioner for Public Interest Disclosure
Can effectively prepare a brief for prosecution.	<ul style="list-style-type: none"> Will be able to prepare a brief of evidence for prosecution. Evidence obtained from coercive interviews is not admissible, but further evidence located as a result is admissible. 	<ul style="list-style-type: none"> Technical restrictions on the admissibility of evidence in subsequent prosecutions, and lack of clarity around the use of derivative evidence.
Able to be involved in prosecutions as witnesses.	<ul style="list-style-type: none"> Will not be a prosecutor, but will provide briefs of evidence to the DPP, and ICAC investigators will be able to give evidence of their investigation in court. 	<ul style="list-style-type: none"> Is not a prosecutor, and typically refers criminal matters to Police at an early stage so as to avoid compromising a potential criminal prosecution due to difficulties using PID evidence. PID investigators prohibited from giving evidence of their investigation in court.
Unfettered discretion.	<ul style="list-style-type: none"> Will have complete discretion as to which matters it prioritises, and whether it pursues and investigation, allowing more complete control of available resources. A wide range of referral bodies are available. 	<ul style="list-style-type: none"> Required to investigate every allegation unless certain technical criteria are met or a referral can be arranged. Limited referral bodies are available.
Can direct some referred investigations, and can investigate if not satisfied with the referral body's investigation.	<ul style="list-style-type: none"> When referring a matter to another body to investigate, the ICAC will be able to oversee the investigation, including controlling or directing the investigation. This does not apply to investigations referred to independent entities such as the Ombudsman. However, the ICAC can initiate an investigation into an allegation even if that allegation was previously referred. 	<ul style="list-style-type: none"> When referring a matter to another body to investigate, PID has no further control of the investigation, no matter how it is handled.
No requirement to give a 'heads up' notice.	<ul style="list-style-type: none"> Investigations will be able to commence covertly. 	<ul style="list-style-type: none"> Investigations cannot commence until the responsible authority for the public body in question is notified of the investigation.
Public reports about systemic issues can be made.	<ul style="list-style-type: none"> Where one or more investigations reveal systemic issues in relation to improper conduct, the ICAC will be able to make a report to the Speaker, who must table the Report. 	<ul style="list-style-type: none"> Improper conduct can only be reported publicly where a public body fails to implement the PID Commissioner's recommendations.

6 Which are the two recommendations of the Martin Report that have not been adopted?

The Martin Report made 52 Recommendations, and the Government committed to implementing 50 of the 52, in principle and subject to advice.

The two recommendations which are not being followed are Recommendations 4 and 5, which 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.

Independent Commissioner Against Corruption – Frequently Ask Questions

A more detailed table setting out how the ICAC Bill advances the implementation of the remaining 50 Recommendations is available at [ICAC-Fact-Sheet-FAQs](#). Some Recommendations have been implemented in principle rather than to the letter. For example, given that the Government intends to appoint a full-time ICAC, the Bill does not provide for a separate CEO role in addition to the ICAC, rather provides that the ICAC will be the CEO. Following from that, while the ICAC will be supported by an Office as per Recommendation 1, it will not be a separate statutory entity with its own CEO, as it is envisioned the ICAC will be the hands-on full time CEO of the Office.

Another change that was made is that the ICAC will be able to investigate corruption in local government elections as well as Territory elections, whereas Recommendation 12 of the Martin Report refers only to offences against the Electoral Act.

Recommendation 29 was that if there were to be time limitations on accepting historic complaints, the ICAC be given a discretion to investigate despite the time limits. As the ICAC's jurisdiction is fully retrospective, there are no time limits on historic investigations, and Recommendation 29 is therefore essentially redundant.

Recommendations 3, 9, 42, 48, and 52 require non-legislative action to implement.

ATTACHMENT E

The ICAC and HR Implications for Public Bodies

FACT SHEET

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What is the ICAC?

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If a person is employed or engaged by a public body, they can be investigated by the ICAC

The definition of public body in the Bill is broad, encompassing not only Government Agencies, but statutory authorities, local government councils, contract service providers to other public bodies, and bodies that receive government grants. Any person who is a member, employee, officer, or otherwise engaged by public body is a public officer, and can be investigated by the ICAC with respect to carrying out the functions they are performing for government (or government money they are spending).

Public officers will need to consider whether they should report matters to the ICAC

The ICAC Bill requires the ICAC to create a **mandatory reporting** scheme for public officers to report improper conduct. The exact nature of the reporting obligations and the matters required to be reported will be determined by the ICAC, as different reporting obligations may be appropriate for different workplaces and different levels of seniority (although limited to matters which are 'improper conduct' as defined by the Bill). There will be no criminal penalties for failure to comply with the mandatory reporting scheme, but it may lead to adverse comment by the ICAC to the public body, and adverse comment about the public body in an audit.

Whether or not a matter must be reported under the mandatory scheme, public officers are encouraged to report improper conduct under the whistleblower protection scheme. Part 6 of the Bill details the whistleblower protection scheme, which will replace the existing scheme in the *Public Interest Disclosure Act*. Public officers should be advised that to qualify for protection, a matter must be reported to one of a number of persons or bodies defined in clause 90 of the Bill. This is called making a **protected communication**.

A person cannot be civilly or criminally liable, or liable to disciplinary action for making a protected communication. However, reporting their own improper conduct does not prevent them from being prosecuted or disciplined for that improper conduct.

Any person can make a protected communication. They do not have to be a public officer.

How whistleblower protection relates to other employment laws

It is an offence to commit **retaliation** against a whistleblower. Retaliation means causing or threatening a person with harm for making a protected communication or to deter them from making a protected communication. The definition of harm is broad, including not only physical and mental harm, but intimidation, harassment, and adverse treatment in relation to employment, career, profession, trade or business.

This means that a whistleblower who suffers retaliation in the workplace may be able to choose between fair work proceedings and bringing a claim for compensation for retaliation under the ICAC Bill, and should seek legal advice on the comparative merits of these two alternative actions. There have been technical changes to the procedures involved in making a claim for compensation for retaliation which facilitate better access to justice. These include limits on legal costs that can be awarded against a whistleblower, the ability to lodge a claim in the Local Court or NT Civil and Administrative Tribunal, and provisions which require the courts to consider suppression of the whistleblower's identity. This reflects research which shows that keeping a whistleblower's identity confidential is often the best protection, a principle which has been enshrined in the Bill (at clause 88).

Rights and responsibilities of whistleblowers

When a person makes a protected communication, they are now required to be informed of the matters listed at clause 95 and Schedule 2 of the Bill. While the tools for protecting whistleblowers have been strengthened compared to the *Public Interest Disclosure Act*, there are also responsibilities on whistleblowers to take reasonable steps to seek assistance if they experience or fear retaliation, and to consider accessing support services. Failure to take reasonable steps may impact the amount of damages that can be claimed in a compensation claim.

Whistleblowers need to be aware that they are not immune from disciplinary action because they are whistleblowers. An employee who is performing poorly or who breaches the code of conduct can suffer adverse employment action for those reasons.

Rights and responsibilities of managers

Managers need to be aware that they can take disciplinary action against an employee who is a whistleblower, but if the manager is prosecuted for retaliation, the onus will be on them to demonstrate that the disciplinary action was not taken for reasons other than retaliation. Managers need only prove a subjective belief they were taking reasonable action, but this represents a shifting of the onus from the whistleblower to the manager to prove what was going on inside the manager's head when the action was taken.

Proactive tools for protecting whistleblowers

Under the new scheme, the ICAC will be able to direct public bodies to take action to protect persons from retaliation. If the public body wishes to challenge the direction, they can apply to the Supreme Court, but the resulting procedure has protections that allow the court to hear information about the whistleblower's identity and the person's need for protection in the absence of the public body. A whistleblower themselves can still seek an injunction or interim injunction to stop anticipated retaliation.

The new Bill generally places an obligation on public bodies to take active steps to develop policies, procedures, and training for reporting corruption and protecting whistleblowers. The ICAC issues guidelines and directions on best practice measures, and audit and report on the compliance of public bodies with these measures. The Bill makes the steps taken by the body in relation to policies and training to prevent retaliation relevant to the amount of compensation a public body would pay in a claim of retaliation in the workplace.