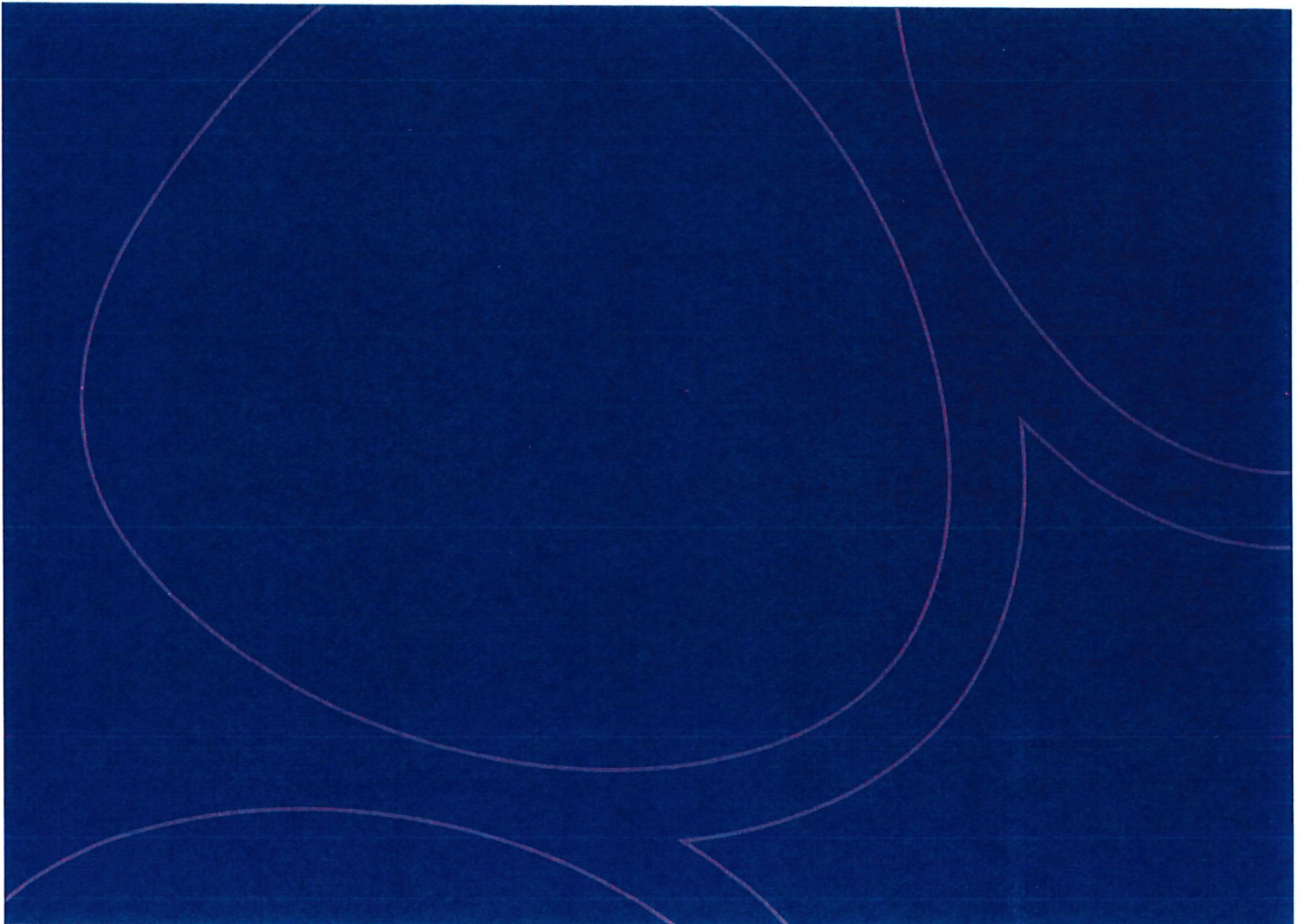


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**ANNUAL REPORT OF INSPECTOR PURSUANT TO SECTION  
137 OF THE INDEPENDENT COMMISSIONER AGAINST  
CORRUPTION ACT 2017 OF EVALUATION OF THE  
INDEPENDENT COMMISSIONER AGAINST CORRUPTION  
PURSUANT TO SECTION 136 OF THE ACT**

September 2022



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## 1. Executive Summary

1. This is my Annual Report as Inspector of the Independent Commissioner against Corruption for the financial year 2021-2022 pursuant to sections 136 and 137 of the *Independent Commissioner against Corruption Act 2017* ("ICAC Act"). Those provisions, respectively, require the Inspector to evaluate the performance of the ICAC for a financial year and to provide the Report to the ICAC Minister, that is, the Chief Minister, within three months after the end of the financial year to which the report relates. This is the third such report that I have prepared since my appointment by the Administrator of the Northern Territory as Inspector of the Office of the Independent Commissioner against Corruption (OICAC or Office of the ICAC) Northern Territory on 28 September 2018.
2. As required by the legislation, I have evaluated the performance of the OICAC for the financial year 2021-2022 and set out the results of that evaluation below. In summary, I am generally satisfied with the present performance of the OICAC although, particularly towards the end of the financial year 2020-2021 and at the commencement of the financial year as to which I am reporting, several issues arose which have caused me concern. I said in last year's Report:

For several reasons which I will set out below, it is too early to come to a concluded view about such matters. One reason is the pendency of several items of litigation seeking to challenge decisions, findings, and reports of the OICAC. Clarity will only be obtained when the Supreme Court of the Northern Territory determines the proceedings in question, and I have sufficient time to digest the Court's reasons.

One such item of litigation, *Moriarty v Independent Commissioner against Corruption* [2022] NTSC 46 was determined on 23 June 2022 and I consider it (and associated, now also resolved, litigation) below. After the relevant reporting period, and on 9 September 2022, the Northern Territory Supreme Court also determined *Sherrington v Independent Commissioner Against Corruption (NT) & Ors* [2022] NTSC 67 declining an application for leave to allege ICAC acted in bad faith pursuant to s 155 of the ICAC Act.

3. The founding Commissioner Mr Kenneth Fleming QC retired on 5 July 2021 and his position was taken by Mr Michael Riches, formerly Deputy Commissioner of the South Australian Independent Commission against Corruption, who formally commenced his

role as Commissioner on 6 July 2021.

4. In last year's Report I mentioned that there had been a substantial increase in the number and complexity of complaints received by my office. In the financial year 2019-2020, I received seven complaints, only two of which were of any real substance. In contrast, in 2020-2021, I received more than double the number received in the previous reporting period. This trend has continued and, in addition, the complaints received have raised difficult issues, some of which I have determined adversely to the OICAC, as discussed below.

## 2. Functions and Duties of Inspector - Statutory Framework

5. Section 134 of the ICAC Act provides as follows:

### ***134 Appointment of Inspector***

*(1) The Administrator must appoint an eligible person to be the Inspector for this Act.*

*(1A) The appointment may be made only after receiving a recommendation of the Legislative Assembly.*

*(1B) The Minister must table a copy of the appointment in the Legislative Assembly within 6 sitting days after the appointment is made.*

*(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.*

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6. Subsections (1A) and (1B) were added by amendment to the legislation after my appointment so did not apply to my appointment. See *Integrity and Accountability Legislation Amendment Act 2019*. Section 18 of that Act amended section 134 of the ICAC Act to insert the two sub-sections in question. I fully support those provisions. The Territory Legislature to which, through the Chief Minister, the Inspector ultimately reports, should be involved in the appointment of the Inspector, it seems to me.
7. The Administrator of the Northern Territory appointed me as Inspector of the Office of the Independent Commissioner against Corruption (OICAC or Office of the ICAC) Northern Territory on 28 September 2018. I was the Inspector of the New South Wales Independent Commission against Corruption having been appointed to that office on 1 July 2017. That role ceased on 30 June 2022. On 1 July 2022 I commenced a five-year term as Inspector of the New South Wales Law Enforcement Conduct Commission.
8. My appointment is for a term of five (5) years pursuant to section 134 of the ICAC Act. Section 134 (5) provides, in effect, that no person can serve as Inspector longer than five years. Consequently, I will cease my role as Inspector no later than 27 September 2023.
9. The Administrator made a Determination of Conditions of Inspector at an Executive Council Meeting on 29 November 2018.
10. Section 135 of the ICAC Act specifies the following as functions of the Inspector:
  - (a) to evaluate the performance of the ICAC 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 performance of functions under the Act;
  - (d) to perform other functions conferred on the Inspector under the ICAC Act. Subject to the matters referred to in paragraphs 15-17 below, no additional functions have been conferred on me under the ICAC Act or any other Act.
11. As stated above, section 136 requires the Inspector to evaluate the performance of the ICAC. In doing so, the Inspector must consider:
  - (e) whether the ICAC and members of ICAC staff acted within power and in compliance with the Act and any other Acts or subordinate legislation;
  - (f) whether the ICAC has implemented any previous recommendations made by the Inspector;

- (g) any other matters the Inspector considers relevant.
12. Section 137 requires the Inspector to give a copy of the proposed report on evaluation to the ICAC and to afford a reasonable opportunity to comment on the proposed report and to include a fair representation of the ICAC's comments in the report. I have done so and have taken account of the Commissioner's comments in concluding the final version of this Report. Sub-sections 137(3) and (4) require the Inspector to provide the report to the Chief Minister within three months of the end of the financial year to which it relates, and the Chief Minister is required to table this in the Legislative Assembly within six sitting days.
13. Section 138 deals with complaints about the ICAC, the ICAC's office and ICAC staff members. It permits any person to complain about such people to the ICAC itself or to the Inspector. If the complaint is made to the ICAC, the ICAC must notify me as Inspector within 14 days. I am empowered (section 138(3)) to deal with a complaint in any manner I consider appropriate. Under section 139, the Inspector is entitled to full and free access to the ICAC premises and all items in the possession and control of the ICAC for an evaluation under section 136 and dealing with a complaint under section 138.
14. Section 140 provides the Inspector with further powers, but it is unnecessary to set them out here. Section 142 deals with staff of the Inspector and, in effect, enables staff of an existing agency to be allocated to the Inspector.
15. The Surveillance Devices Act 2007 confers a significant additional function on me as Inspector. That legislation relevantly provides, as follows:

**64A Inspection of ICAC records by Inspector**

- (1) *The Inspector must, from time to time, inspect the records of the ICAC to decide the extent of compliance with this Act by ICAC officers.*
- (2) *For the inspection, the Inspector:*
- (a) *after notifying the ICAC, may enter at any reasonable time a place occupied by the ICAC; and*
  - (b) *is entitled to have full and free access at all reasonable times to all records of the ICAC that are relevant to the inspection; and*
  - (c) *may require an ICAC officer to give the Inspector information that:*
    - (i) *is in the officer's possession or to which the officer has access; and*
    - (ii) *is relevant to the inspection.*

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- (3) *The ICAC must give, and ensure other ICAC officers give, the Inspector any assistance the Inspector reasonably requires to enable the Inspector to perform functions under this section.*

**64B Inspector's reports on investigations**

- (1) *The Inspector must make a written report to the Minister at six monthly intervals on the results of each inspection under section 64A.*
- (2) *The Minister must table a copy of the report in the Legislative Assembly within six sitting days after receiving the report.*

As was the case at the time of the 2019-2020 and the 2020-2021 Annual Reports, no warrants have been issued pursuant to this legislation to the ICAC or to any officer thereof and consequently there has been no occasion for me to carry out the inspection required by section 64A or make the report required by section 64B of this Act. I understand that this position may shortly change, and I will be required to carry out the functions imposed on me by this legislation. I will do so and propose to furnish the six-monthly reports required in approximately March and September each year while I remain Inspector.

16. Section 71A of the *Police (Special Investigative and Other Powers) Act 2015* requires me as Inspector to conduct an audit of ICAC records in relation to an authority to acquire and use an assumed identity at least every six months while an authority is in force and at least in the six months after the authority has ended. The actual terms of the legislation are as follows:

**71A Audit of records – the ICAC**

- (1) *The Inspector must arrange for the records kept under section 70 by the ICAC for each authority in relation to the ICAC to be audited:*
  - (a) *at least once every six months while the authority is in force; and*
  - (b) *at least once in the six months after the cancellation or expiry of the authority.*
- (2) *The audit is to be conducted by a person appointed by the Inspector.*
- (3) *The person appointed to conduct the audit:*
  - (a) *may be a member of ICAC staff; and*
  - (b) *must not be a person:*
    - (i) *who granted, varied or cancelled any of the authorities to which the records under section 70 relate; or*
    - (ii) *who is or was an authorised person under any of the authorities to which those records relate.*
- (4) *The results of an audit are to be reported to the Inspector.*

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(5) *In this section:*

*member of ICAC staff, see section 4 of the ICAC Act.*

Pursuant to section 71A(3) quoted above, I appointed a member of the ICAC staff to conduct the audit required by section 71A(1) on 15 May 2022. That staff member performed the audit required and reported the results of the audit to me pursuant to section 71A(4) on 17 June 2022. I determined that the Report and its delivery to me as Inspector complied with section 71A of the *Police (Special Investigative and Other Powers) Act 2015*.

17. Sections 15, 16, 16A and 16B of the *Telecommunications (Interception) Northern Territory Act 2001* provide:

**15 General power to inspect and report on ICAC records**

(1) *The Inspector may at any time:*

(a) *inspect the records of the ICAC to determine compliance by the ICAC and members of ICAC staff with Part 2, Division 2 during any period; and*

(b) *report to the Minister about the results of the inspection.*

(2) *The Inspector may do anything necessary or convenient for the purposes of subsection (1).*

**16 Regular inspections of ICAC records**

(1) *At least once in each period of 6 months, the Inspector must inspect the records of the ICAC to determine compliance by the ICAC and members of ICAC staff with Part 2, Division 2 since the last inspection.*

(2) *Not later than 3 months after the end of each financial year, the Inspector must report in writing to the Minister on the results of inspections carried out in that financial year.*

**16A Report on contravention**

*If, as a result of an inspection, the Inspector is of the opinion that the ICAC or a member of ICAC staff has contravened the Commonwealth Act or the ICAC has contravened section 8C(a), the Inspector must:*

(a) *allow the ICAC an opportunity to provide written comments in respect of that matter; and*

(b) *include in the report under section 15(1)(b) or 16(2):*

(i) *a report on the contravention; and*

(ii) *a copy of the written comments of the ICAC.*

**16B Notification of report**

*If the Inspector has provided a report under this Division to the Minister, the Inspector:*

(a) *must notify the Commonwealth Minister, in writing, that the report has been*



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*given; and*

*(b) must provide the ICAC with a copy of the report.*

The ICAC has advised that telecommunications interceptions will require further legal authority as an 'enforcement agency' under the Commonwealth Act. The ICAC has commenced negotiations with the Commonwealth Department of Home Affairs and, subsequently the Commonwealth Attorney-General's Department to bring about the required legislative reform. The ICAC has indicated that an update package will be prepared for me, as the Inspector, prior to any application being made under this Act. Thus, it has not been either necessary or possible for me to exercise my powers under this legislation. There may, in fact, be an issue in relation to this matter. I became aware in my former capacity as Inspector of the NSW ICAC that, to date, the Commonwealth has declined to permit persons in the position of Inspector to have access to telecommunications intercept material for the purpose of performing an audit. There have been attempts over the years to persuade the Commonwealth to change this, but they have to date been unsuccessful.

18. On 20 February 2020 the Legislative Assembly passed a resolution establishing a Standing Committee on the ICAC in the following terms:

1. *That this Assembly establishes a Standing Committee on the ICAC and designates it receive reports and perform other functions in relation to the Independent Commissioner Against Corruption (Commissioner) pursuant to Section 5 of the Independent Commissioner Against Corruption Act 2017 (the Act).*
2. *The functions of the Committee are to:*
  - a. *perform the functions of the Assembly Committee under the Act;*
  - b. *examine each Annual Report of the Commissioner and the Inspector under section 128 and 137 of the Act;*
  - c. *report to the Assembly on matters relating to tabled reports which have been referred to the Legislative Assembly by the Commissioner under section 53 and 54 of the Act;*
  - d. *examine trends in similar bodies in Australia and internationally, including trends in the legislation and administration of these bodies, to ensure the NT ICAC remains fit-for- purpose.*
3. *The Committee's functions do not include:*
  - a. *investigating a matter relating to particular conduct, or*
  - b. *reconsidering a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or*
  - c. *reconsidering the findings, recommendations, determinations or other decisions of the Commissioner or the Inspector, in relation to a*

*particular investigation, preliminary inquiries, audit, review, referral, or complaint.*

4. *The membership of the Committee will be two Government Members of which one will be Chair and the other the Deputy Chair of the Committee, one Opposition Member and one non-party aligned Member. Membership of the Committee will be subject to conflict of interest considerations to ensure members are free from perceived or actual bias.*

19. I welcome the establishment of the Standing Committee and look forward to working with it and its members to the extent that they feel desirable. I am happy to discuss any matter relating to my office as Inspector with the Committee, whether formally or informally, except those proscribed by paragraph 3 of the resolution.
20. I note that Mr Greg Shanahan PSM carried out a review of the ICAC Legislation under the auspices of the Department of the Chief Minister and Cabinet (CM&C), reporting in January 2022 with a Discussion Paper. I addressed two topics of possible legislative reform as Inspector by submission to Mr Shanahan, first, the powers of the Inspector to obtain information and, secondly, whether the legislation should include a definition, such as misconduct or illegality, of the matters concerning which complaints may be made to the Inspector about the OICAC. After contact with Mr Shanahan, I learned that he already intended to address the second of those two topics in his report. Consequently, I made a submission limited to the first of the topics in the following terms:

*Thank you for your prompt reply. The matter you mention concerning the current wording of section 135(1)(b) was one of two matters I wish to raise. As you have included it in your report already in a manner consistent with my views, I need say nothing further about it.*

*The other matter I want to raise is whether consideration should be given to including in the legislation provisions along the lines of sections 57C, 57D, 57F and 57G of the New South Wales legislation. Those provisions are in the following terms:*

#### **57C Powers of Inspector**

The Inspector—

- (h) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and
- (i) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and
- (j) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and
- (k) may require officers of the Commission to attend before the Inspector to

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answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and

- (l) may investigate and assess complaints about the Commission or officers of the Commission, and
- (m) may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and
- (n) may recommend disciplinary action or criminal prosecution against officers of the Commission.

### **57D Inquiries**

- (1) For the purposes of the Inspector's functions, the Inspector may make or hold inquiries.
- (2) For the purposes of any inquiry under this section, the Inspector has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the Royal Commissions Act 1923 and that Act (section 13 excepted) applies to any witness summoned by or appearing before the Inspector in the same way as it applies to a witness summoned by or appearing before a commissioner.
- (3) A witness summoned by or appearing before the Inspector is to be paid such amount as the Inspector determines, but not exceeding the amount that would be payable to such a witness if he or she were a Crown witness subpoenaed by the Crown to give evidence.

### **57F Incidental powers**

- (1) The Inspector has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector's functions. Any specific powers conferred on the Inspector by this Act are not taken to limit by implication the generality of this section.
- (2) Section 40 of the Surveillance Devices Act 2007 does not apply to the use, publication or communication of protected information within the meaning of that Act in relation to the exercise of the Inspector's functions under section 57B.

### **57G Former officers of the Commission**

For the avoidance of doubt, a reference in any other provision of this Part to an officer of the Commission includes a reference to a former officer of the Commission.

*My concern is that section 139 of the Northern Territory legislation may, in certain circumstances, be insufficient to enable the Inspector to carry out adequate enquiries. In particular, the Assembly may think it desirable to grant to the Inspector the ability to compel persons other than OICAC staff to provide information, including documents, to him. I have to say that in my four years as the New South Wales Inspector I have never used the powers granted by section 57D and anticipate completing my five year term without ever having done so. Nevertheless, it may be useful to have such a power as a backup if persons outside the OICAC decline to provide information relevant to an enquiry. I should*

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*add that I do not believe that any enquiry I have conducted has been impacted by the absence of such a power but, nevertheless, it seems appropriate part of the armoury of powers that an Inspector should have.*

*Thank you for considering this submission.*

21. Mr Shanahan's Discussion Paper dealt with the role of the Inspector in the following terms:

*7. Role of the ICAC Inspector*

*The initial review received submissions that ICAC staff complaints received by the Inspector of the ICAC would be more appropriately dealt with by other bodies or processes, including grievances under the Public Sector Employment and Management Act 1993. The initial review agreed with this view.*

*The initial review concluded that the complaints handling role of the Inspector should not be a general one and should be restricted to matters that relate to misconduct that would usually be made to the ICAC itself. It is proposed that section 135(1)(b) of the ICAC Act should be amended to limit complaints to the Inspector to matters related to misconduct modelled on subsections 57B(1)(b) and (c) of the NSW Independent Commission Against Corruption Act 1988.*

*The sufficiency of the powers of the Inspector under section 139 of the ICAC Act to investigate complaints about the ICAC was raised as an issue. The initial review recommended, to remove any doubt about the ICAC Inspector's powers to investigate matters, that section 139 of the ICAC Act should be amended to include provisions modelled on sections 57C, 57D, 57F and 57G of the NSW Independent Commission Against Corruption Act 1988.*

*7.1. Recommendations*

*The initial review recommended that:*

- 7.1 section 135(1)(b) of the ICAC Act be amended to limit complaints to the Inspector modelled on subsections 57B(1)(b) and (c) of the NSW Independent Commission Against Corruption Act 1988; and*
- 7.2. section 139 of the ICAC Act be amended to include provisions modelled on sections 57C, 57D, 57F and 57G of the NSW Independent Commission Against Corruption Act 1988.*

*Department of THE CHIEF MINISTER AND CABINET*

*January 2022 |*

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*7.2. Discussion questions*

- What is the scope of complaints that the ICAC Inspector should consider under the ICAC Act?*

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- *What should the legislative powers of the ICAC Inspector be?*

22. Finally on the topic of legislation, I should point out that the *Public Sector Employment and Management Act 1993* ("PSEMA"), the *Financial Management Act 1995* and the *Information Act 2002* do not apply to my office. The latter Act contains a specific exemption in section 49E thereof. While this legislation does not apply to me or my Office, I hope that I have complied, nevertheless, with section 5F of the PSEMA and the following parts thereof, mutatis mutandis:

- (1) *The performance and conduct principle is that a public sector officer must do the following:*
  - a. *carry out the officer's duties as follows:*
    - i. *objectively, impartially, professionally and with integrity;*
    - ii. *to the best of the officer's ability;*
    - iii. *in accordance with the Act and any code of conduct applicable to the officer under section 16(2)(c);*
  - b. *treat other public sector officers, other persons in the workplace and members of the public fairly, equitably and with proper courtesy and consideration;*
  - c. *ensure effective, efficient and appropriate use of public resources;*
  - d. *avoid actual or apparent conflicts of interest between personal or other interests and duties as a public sector officer . . . .*

### 3. The Northern Territory Inspectorate

23. The Inspectorate maintains the following website, to which I invite reference, and the stated methods of contact, particularly for the making of complaints:

- (o) Website, which has been operative since late 2018. The address is <https://oiicac.nt.gov.au>. That website describes the nature of the office, the procedure for complaints, how the Inspector is accountable and contact details;
- (p) Methods of contact. These are principally for receiving complaints and liaising with CM&C. The email addresses are: [Bruce.Mcclintock@oiicac.nt.gov.au](mailto:Bruce.Mcclintock@oiicac.nt.gov.au); [inspector@oiicac.nt.gov.au](mailto:inspector@oiicac.nt.gov.au); [admin@oiicac.nt.gov.au](mailto:admin@oiicac.nt.gov.au). The second address is the one specified on the website for receiving complaints.

24. Funding for my office and remuneration is the responsibility of CM&C. It would have been inappropriate for my office to be an expense of the ICAC (which had been proposed) because of the nature of the relationship between the Inspector and the ICAC established by the legislation.

25. My appointment as Inspector is part-time and I perform my duties on an "as needed"

basis. I have, since my appointment in 2018, tried to visit Darwin at least twice a year to monitor the performance of the OIICAC and otherwise carry out my statutory duties as Inspector. That, unfortunately, has not been possible over the last few years because of the Covid-19 pandemic and the associated border closures. I last visited in April 2021 although I visited Darwin in the week of 19 September 2022, for the purpose of carrying out the evaluation of the performance of the OIICAC required for this Report and met with Mr Riches for that purpose on two occasions. In addition, I met with the members of the Legislative Committee Standing Committee on the ICAC during that visit. I have been in regular contact with Mr Riches throughout 2021-2022 and met with him in Sydney in June 2022.

## 4. Administrative Matters

26. Administrative support is being provided to me in my capacity as Inspector by officers of CM&C, specifically, by Ms Jean Doherty and by Ms Mel Griffith. The latter manages document retention on my behalf. Both have executed Confidentiality Agreements with me. I am grateful to them and acknowledge the very great assistance and help they have given. I wish to acknowledge particularly the assistance Ms Griffith has given to me.

## 5. Relations with the Office of the ICAC

27. While the Office of the Inspector is independent of the ICAC and is bound to exercise a significant oversight role in relation to the Office of the ICAC under the Act, I know from previous experience that performance of the Inspector's functions is significantly enhanced by a cordial and cooperative working relationship between the Commissioner and the Office of the ICAC on the one hand and the Inspector on the other. I am pleased to report that such a relationship exists (in my perception), between myself and the Commissioner, Michael Riches and the ICAC staff with whom I have dealt.
28. Relations between myself and the Office of the ICAC have been formalised by a Memorandum of Understanding (MOU) executed by the Commissioner and me in April 2019. A copy of the MOU was attached to the Preliminary Report that I submitted to the Chief Minister on 30 September 2019.
29. Pursuant to the MOU (and section 138 of the ICAC Act), the Commissioner or the Deputy Chief Executive Officer have disclosed a number of significant matters to me

which I record below.

30. I am satisfied, subject to the matters referred to in paragraphs below, that the Commissioner and the Office of the ICAC have dealt with these matters appropriately, both in the way they investigated and in their reporting to me.

## 6. Darwin Turf Club Investigation

31. On 25 June 2021 the former ICAC issued a Public Statement purportedly pursuant to section 55 of the ICAC Act at the conclusion of an investigation into the circumstances in which the Northern Territory Government made a grant to the Darwin Turf Club Inc ("DTCI") to construct a grandstand at its Fannie Bay racecourse. It also submitted a Report dealing with the same subject matter and in almost identical terms to the Chief Minister which was made public on 24-25 July 2021. I consider the issues to which the DTCI Investigation has given rise to be sufficiently significant to warrant dealing with them separately from the other complaints set out in the following section of this Report.

32. A number of complaints and significant issues arose out of the DTCI Report, and it has been the subject of one adverse decision by the Northern Territory Supreme Court, as set out in the following paragraphs. I identify the issues and complaints as follows:

- a. A complaint by News Ltd and the Northern Territory News to me as Inspector ("News Complaint");
- b. a supplementary complaint by News Ltd ("Supplementary News Complaint");
- c. *Moriarty v. Independent Commissioner against Corruption* [2022] NTSC 46 (Kelly J, 23/6/2022);
- d. an issue arising from clandestine recordings by ICAC investigators of a number of conversations commencing with one such with Ms Lorimer, a member of the DTCI Board;
- e. an issue whether section 55 of the ICAC Act authorises release by the ICAC of the Public Statement referred to above on 25 June 2021.

33. I dealt with the News Complaint by a Report pursuant to section 140(3) of the ICAC Act 2017 which I submitted to the Chief Minister on 10 December 2021. As that Report has been tabled in the Legislative Assembly, is unnecessary to repeat what I said in any detail. I concluded:

1. *This report determines a complaint concerning the conduct of the Independent Commissioner against Corruption ("ICAC") made by Nationwide News Pty Ltd ("News"), the publisher of the Northern Territory News, and its former editor, Mr Matt*

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*Williams. That complaint concerns the Public Statement issued by the ICAC on 25 June 2021 at the conclusion of its investigation into the circumstances in which the Northern Territory Government made a grant to the Darwin Turf Club ("DTC") to construct a grandstand at its Fannie Bay racecourse. In addition, I have decided to deal with the same issue in respect of a Report which the ICAC prepared and provided to the Chief Minister dealing with the DTC grant. At the time the Public Statement and Report were issued, Mr Kenneth Fleming QC was the Independent Commissioner against Corruption. Mr Fleming retired from that position shortly thereafter.*

2. *I have determined that the ICAC breached section 50(2) of the Independent Commissioner Against Corruption Act 2017 ("ICAC Act") by failing to give Mr Williams and News notice of an adverse finding contained in the Report, denied Mr Williams and News procedural fairness in respect of a similar adverse finding contained in the Public Statement and that the conduct of the ICAC in relation to the finding against Mr Williams and News was unsatisfactory. I make recommendations to deal with these matters.*
  3. *That said, there are several matters which emerge from my investigation. The inclusion of [416] in the Public Statement and its analogue in the Report to the Chief Minister seems to have been prompted by a siege mentality that developed inside the ICAC concerning the NT News and fear about its coverage Report by the Inspector Pursuant to Section 140(3) of the Independent Commissioner Against Corruption Act 2017 into a Complaint by News Corp Australia, the Northern Territory News and Matt Williams of the ICAC investigation into the DTC grandstand matter. Such an attitude is inappropriate for a body such as the ICAC. Inevitably, such agencies will be criticised, sometimes severely and sometimes unfairly, in the media. It would be absurd to think that all such criticism will be fair or accurate. Much probably will not be. Agencies such as the ICAC are, by their very nature, controversial and deal with controversial issues which must be the subject of report and debate in a democratic society. Such debate may not always be dispassionate and considered but sometimes angry and contentious. The media is where such reporting and debate must take place. Officers of such agencies may perceive such external criticism to be unfair and, indeed, on many occasions, it may be. But the best response to such criticism is to ensure that the agency carries out its significant investigative functions competently and fairly. It is, almost invariably, a mistake to respond to such matters. It clearly was in this case.*
  4. *Thus, for the reasons I have given, while I do not believe the word "unprofessional" is appropriate, I do regard the ICAC's performance in the respects considered in this report as unsatisfactory and falling short of the standards which should govern its conduct.*
  5. *What, then, should be done to deal with the matter? As this is a Report pursuant to section 140 of the Act, I will submit it to the Chief Minister. He was the recipient of the ICAC Report on 24 June 2021, which has not been made public. Submission of this report to the Chief Minister seems to me to be sufficient to correct any misleading impression arising from the inclusion of part only of the relevant text message. Different considerations arise in relation to the Public Statement because it was made public on 25 June 2021 and remains on the ICAC website. Accordingly, I recommend that the ICAC amend that version of the Public Statement to delete the passages set forth in [4] above and add a link to a copy of this Report, whether on the ICAC website or on that of the Inspector.*
34. Similarly, I submitted a Report pursuant to section 140(3) of the ICAC Act dealing with the Supplementary News Complaint to the Chief Minister on 14 January 2022. I concluded:



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1. *This Report, pursuant to section 140(3) of the Independent Commissioner against Corruption Act 2017 ("ICAC ACT"), deals with a complaint formally made to me by News Corp Australia ("News Corp") on 14 December 2021 raising issues concerning an alleged disclosure of information obtained by the Independent Commissioner against Corruption ("ICAC") in the course of performing functions connected with the administration of the ICAC Act within the meaning of section 145(1) thereof.*
2. *I have decided that actions in question do not involve any misconduct, impropriety or breach of the ICAC Act and, therefore, the News Corp complaint should be dismissed.*

35. Mr Damien Moriarty commenced proceedings against the ICAC alleging a series of denials of procedural fairness in the DTCL Investigation and report as follows:

*Grounds of Review*

*[69] The plaintiff has advanced the following grounds for the orders sought on judicial review.*

*Ground 1: The defendant had no jurisdiction to make the Adverse Findings against the plaintiff in circumstances where the plaintiff was not informed that he was under investigation at the relevant times.*

*Ground 2: The defendant failed to afford the plaintiff procedural fairness by not informing the plaintiff that he was under investigation and/or positively assuring him that he was not under investigation until after the proposed findings were made.*

*Ground 3: The defendant failed to afford the plaintiff procedural fairness by failing to ensure and/or permit re-examination of, or submissions by, the plaintiff prior to the making of the proposed findings.*

*Ground 4: The defendant failed to afford the plaintiff procedural fairness by failing to put all matters on which the proposed findings and Adverse Findings were allegedly based to the plaintiff in examination.*

*Grounds 5 and 6: Adverse Findings against the Board*

*Ground 5: The defendant failed to afford the plaintiff procedural fairness by failing to ensure that he was on notice of a risk of adverse findings to him and/or had an opportunity to respond to any proposed adverse findings in his capacity as a member of the Board on matters the subject of the inquiry.*

*Ground 6: The defendant had no jurisdiction to make the findings about the Board without ensuring the plaintiff was on notice of a risk of adverse findings to him and/or that he was given an opportunity to respond to any such proposed adverse findings in his capacity as a member of the Board on matters the subject of the inquiry.*

*Grounds 8 and 9: failure to consider the plaintiff's Response*

*Ground 8: The defendant failed to afford the plaintiff procedural fairness and/or his reasoning was not objectively reasonable by failing to:*

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*(a) Consider and evaluate rational arguments of the plaintiff in his Response said to displace the basis for adverse findings and failing to provide reasons for their rejection.*

*(b) Alternatively, failure to give proper, genuine and realistic consideration to the plaintiff's Response. [Grammar and punctuation in the original.]*

*Ground 9: The defendant erred by failing to take into account a relevant mandatory consideration being the plaintiff's Response.*

*Grounds 7 and 10: making findings without evidence*

*Ground 7: The defendant erred by making findings in the Report that had no evidentiary basis or which could not be reasonably made on the evidence or reasonably inferred from facts found.*

*Ground 10: The defendant erred by making findings (ie the Adverse Findings) that had no evidentiary basis or which could not be reasonably made (sic) on the evidence or reasonably inferred from facts found.*

*Ground 11: The defendant denied the plaintiff procedural fairness by failing to ensure that any relevant exculpatory material of information was disclosed to the plaintiff.*

*Ground 12: The defendant published the Report in a manner that was not authorised pursuant to s 50 and/or s 55 of the ICAC Act.*

36. Kelly J, on 23 June 2022, gave judgement upholding Grounds 5 and 6 as set out above but rejecting the remainder. The following passages of her Honour's judgement set out her reasoning Grounds 5 and 6:

*[135] In failing to give the plaintiff notice of the proposed findings of unsatisfactory conduct and breach of public trust against the Board of which he was a member, and by taking the quite extraordinary step of directing the other Board members not to disclose that information to the plaintiff on pain of criminal sanction, the defendant deprived the plaintiff of knowledge of the issues – namely the issue of whether the primary factual findings warranted findings of unsatisfactory conduct and breach of public duty on the part of the Board members, and the opportunity to be heard in relation to those issues.*

*[136] The defendant pointed out that in his Response, the plaintiff did provide a response to some of the proposed primary findings but did not respond to others. That is understandable given that the Personal Natural Justice Extract did not give notice that those primary findings were to be used to make findings of unsatisfactory conduct and breach of public trust against the plaintiff and other Board members. If the plaintiff had been given the appropriate notice of those proposed findings, his approach may well have been different. He was not given that opportunity.*

*[137] This, it seems to me, is a failing by the defendant akin to the second category referred to by Gageler and Gordon JJ in WZARH referred to at [115] above. The procedure adopted by the defendant in itself failed to afford a fair opportunity to the plaintiff to be heard on the*

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*issue of whether the primary findings of which the plaintiff was made aware, justified the findings of unsatisfactory conduct and breach of public trust by the plaintiff and other Board members. In such a case, the practical injustice lies in the denial of an opportunity which in fairness ought to have been given, and this justifies the making of a declaration unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome.*

*[138] In this case it has not been shown that the failure to accord procedural fairness in this respect did not deprive the plaintiff of the possibility of a successful outcome. It is not the case that if the primary findings are accepted, they lead inevitably to the conclusions set out in the Board Adverse Findings. I have found against the plaintiff on the ground of review which alleges that there was no evidence on which the Adverse Findings (including the Board Adverse Findings) could have been made. That is not the same as saying that such findings flow inevitably from the primary findings. It is arguable that some or all of them do not. The plaintiff was denied the opportunity to be heard on that issue, which was a live issue.*

*[139] The other Board members were unable to discuss the proposed adverse findings against them with either Mr Dixon or the plaintiff. Quite apart from handicapping the other Board members' ability to respond to the proposed adverse findings against them (a matter that has no relevance to the present proceeding) this meant that the plaintiff was not given notice of the defendant's proposal to make adverse findings against him in his capacity as a member of the Board as required by s 50(2) of the ICAC Act. An essential pre-condition to the making of valid findings adverse to the plaintiff in his capacity as a director of DTCL was not complied with. Further, as explained above this amounted to a denial of procedural fairness.*

*[140] There will be declarations to the effect of those sought under Grounds 5 and 6.*

37. Therefore, her Honour made declarations in the following terms:

- (a) The defendant failed to afford the plaintiff procedural fairness by failing to ensure that he was given notice of a proposal to make findings of unsatisfactory conduct and breach of public trust against him in his capacity as a member of the DTCL Board and to afford him the opportunity to respond to such proposed findings.*
- (b) The defendant failed to give the plaintiff a reasonable opportunity to respond to proposed findings that he was guilty of unsatisfactory conduct and breach of public trust in his capacity as a member of the DTCL Board as required by s 50(2) of the ICAC Act and, accordingly had no jurisdiction to make those findings against him.*

38. The Commissioner on 18 July 2022 issued the following Public Statement:

*In light of the recent findings of the Honourable Justice Kelly in Moriarty v ICAC [2022] NTSC 46, I recently removed from my office's website my predecessor's Public Statement in relation to the investigation into the Darwin Turf Club Grandstand Grant. I did so because Justice Kelly's findings required me to remove certain parts of the Public Statement before it was republished.*

*I have determined that I will not exercise the power to republish that Public Statement on the ICAC website.*

*In light of my decision not to re-publish the Public Statement on the website, parties the subject of adverse findings made by my predecessor in that Public Statement, Mr Brett Dixon, Mr Matthew Moss and the Darwin Turf Club Incorporated have discontinued judicial proceedings they commenced against me in respect of that Public Statement.*

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*I have previously commented publicly on certain aspects of the Turf Club investigation in the public domain. I do not intend to make any further comment on that investigative process, or the findings reached by my predecessor in his report and Public Statement. In deciding not to republish the Public Statement, it should not be understood that I accept all of the criticisms made by parties about that Public Statement, or the findings made by the former Commissioner.*

*My decision not to republish the Public Statement and the discontinuance of the Supreme Court challenges which have followed will put an end to contests which have been an unfortunate distraction to the important work of my office.*

39. Turning then to clandestine recordings, Kelly J in her judgment said this:

*[37] On 14 September 2020, an Investigator with ICAC had an informal meeting in a café with Ms Lorimer, a member of the DTCL Board. During that informal meeting the investigator asked Ms Lorimer questions about the plaintiff. Ms Lorimer praised the work done for DTCL by the plaintiff and expressed the view that the remuneration he received was more than reasonable. Unbeknown to Ms Lorimer, another investigator from ICAC was secretly listening to the conversation through a listening device and the conversation was clandestinely recorded ("the clandestine recording").*

40. Unfortunately, this was not an isolated incident. Commissioner Riches had raised this issue with me well prior to the judgment in *Moriarty v ICAC* by a series of emails commencing on 31 January 2022. By email dated 1 February 2022, Commissioner Riches informed me of the circumstances in which the recording of Ms Lorimer had taken place, that he had met with Ms Lorimer and informed her of the recording, indicated that while, not illegal, it was entirely inappropriate and apologised to Ms Lorimer. Commissioner Riches subsequently spoke to the ICAC staff member responsible for the recording and informed him that, in his view, the recording was entirely inappropriate.

41. Subsequently, on 3 March 2022 Commissioner Riches informed me of six other occasions upon which ICAC staff recorded conversations with persons without that person's consent. The Commissioner provided further information to me by email dated 11 March 2022. On 15 March 2022, I wrote to Commissioner Riches in the following terms:

*Thank you for your email letters to me dated 3 and 11 March 2022 concerning the practice that existed during the period before your appointment as Commissioner of recording conversations with informants and potential witnesses without their knowledge.*

*I am extremely concerned by the matters you have disclosed to me, first, because of the possibility of non-compliance with section 11 (1) of the Surveillance Devices Act 2007 (NT) and, secondly, because I consider it inappropriate and unfair for an integrity agency such as the Office of the Independent Commissioner against Corruption to engage in such conduct.*

*I am considering what action I should take and whether I should myself conduct an investigation as Inspector with a view to making recommendations pursuant to section*

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140(1)(c) or taking action under section 140(2)(b) ("improper conduct") or under section 140(3) of the Act.

If I were to act under section 140(1)(c), without in any way binding myself, it is probable, based on the information I presently have, that I would recommend the following:

Prompt adoption of a protocol or policy setting out in clear terms the circumstances when recordings of the type referred to are permitted to be made and the procedures for obtaining the authority of the Commissioner for doing so and maintenance of records of such decisions, stating the basis for the decision to make the recording;

Adoption of appropriate training for employees in relation to such matters so that they understand what is lawful and what is not.

I would also probably require reporting to me so that I might monitor each occasion when such a recording occurs.

It may be that you have adopted a policy which absolutely precludes such recordings. If so, please let me know.

If you have not determined to prohibit the practice but have decided to take the steps along the lines set out in (a) and (b) above, I will probably not take any further action at the present time. In saying this I take account of the fact that Mr Fleming QC is no longer Commissioner and Mr Osborne has left your Office.

I would appreciate if you would confirm what actions you have taken or propose to take to deal with these issues.

I should add that it will be necessary to refer to this matter in my Annual Report pursuant to section 137 on my evaluation of the ICAC's performance under section 136 of the Act. That provision requires me to consider:

whether the ICAC and members of the ICAC staff acted within power and in compliance with this Act and any other relevant Acts or subordinate legislation. . . .

I look forward to hearing from you.

42. I am pleased to report that Commissioner Riches responded to me on 18 March 2022 treated in the following terms:

*I have already directed my staff that such recordings are prohibited unless under the authority of a warrant or my express written approval.*

*In my return from leave I will issue a written Commissioner's Direction, which repeats that prohibition. I am also minded to:*

- *Direct that all listening devices that are currently owned by my office be placed in a safe, accessible only by my Director Investigations or me.*
- *Require that applications be made in writing to me to use a listening device without the consent of all parties to the conversation (save where a valid warrant is in place).*
- *My written approval will be accompanied by reasons for giving that approval.*
- *I will provide you a copy of my written approval and reasons within 5 days of the giving of the approval.*

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- *Training of staff in respect of the Surveillance Devices Act.*

43. As I indicated in my 15 March 2022 email to the Commissioner, it is necessary for me to comply with section 135 of the ICAC act which requires:

- (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. (My emphasis)*

44. I have considered each of the recording and monitoring incidents to which Commissioner Riches drew my attention. The question under section 135 of the ICAC is whether, in making the recordings of, or monitoring, the conversation question there was a breach of section 11 of the Surveillance Devices Act 2007 which so far as is relevant provides:

*Installation, use and maintenance of listening devices*

- (1) *A person is guilty of an offence if the person:*
  - (a) *installs, uses or maintains a listening device to listen to, monitor or record a private conversation to which the person is not a party; and*
  - (b) *knows the device is installed, used or maintained without the express or implied consent of each party to the conversation.*

*Maximum penalty: 250 penalty units or imprisonment for 2 years.*

- (2) *Subsection (1) does not apply to:*
  - (a) *the installation, use or maintenance of a listening device under:*
    - (i) *a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation; or*
    - (ii) *under a law of the Commonwealth; or*
  - (b) *the use of a listening device by a law enforcement officer or an ICAC officer to monitor or record a private conversation to which the officer is not a party if:*
    - (iii) *at least 1 party to the conversation expressly or impliedly consents to the monitoring or recording . . . .*

45. On the facts as I understand them, the ICAC staff member who monitored the conversations did so “without the express or implied consent of each party to the conversation” and thus there was a prima facie breach of section 11(1), unless

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rendered lawful by section 11(2)(b) of the Surveillance Devices Act quoted above. While the first two elements of that provision (section 11(2)(b)(i) at least one party to the conversation consents and section 11(2)(b)(ii) the ICAC officer is acting in performance of the officer's duty) are satisfied, it is unclear to me whether the third element, that is, that the ICAC officers responsible reasonably believed it was necessary to monitor the conversation for the protection of someone's safety.

46. That is an issue that I am unable to determine, because it involves questions of the state of mind of the relevant ICAC staff at the time the conversations were monitored and I have no power under the ICAC act to compel such persons to respond to any enquiries I might make which, in any event, they could decline to answer on the grounds of the privilege against self-incrimination even if I had such power.

47. I note also that all the ICAC staff involved have left the OICAC and that Commissioner Riches has taken steps (which I regard as adequate and appropriate) to ensure this conduct does not recur. In such circumstances, I consider the appropriate course is to note the matters in question in this report and so draw the attention of the Chief Minister and ultimately to the Legislative Assembly.

48. Regardless of the question whether there was a breach of the Surveillance Devices Act, I wish to record my view, which I have expressed to the Commissioner; that the conduct in question was entirely inappropriate and unfair and should not have occurred. It represents a serious breach of trust towards those people who were unknowingly recorded.

49. The final issue arising from the DTCl Investigation and the Moriarty litigation is the question whether the release of the Public Statement complied with the ICAC Act. Section 55, which appears in Division 7--Reports, Public Statements and Recommendations of Part 3--Identifying and Dealing with Improper Conduct of the ICAC Act provides:

*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;*

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- (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.

50. Kelly J found that the Public Statement issued on 25 June 2021 was authorised by section 55. Her Honour expressed her finding as follows:

*[204] The plaintiff argues that because s 50 provides that an investigation report may include a finding as to whether a person has engaged in, is engaging in or is about to engage in, improper conduct [110] and s 55 does not say that a public statement may contain such findings, s 55 did not authorise the publication of the Adverse Findings.*

*[205] The plaintiff's contention cannot be accepted. Section 59 of the ICAC Act sets out specific limitations on what can be contained in certain kinds of reports under the ICAC Act and in public statements. [111] Such reports and public statements must not contain any material that would not be admissible in civil, criminal or disciplinary proceedings because of s 82, unless the material is already in the public domain. (Section 82 is a protective section which provides that evidence given to the ICAC in certain circumstances is not admissible in evidence against the witness in a civil, criminal or disciplinary proceeding.) There is no warrant in the ICAC Act to imply other limitations on what may be contained in a public statement provided the public statement is made for one or more of the purposes authorised by s 55. Those purposes include providing "information about a referral, including the outcome of the referral". The publication of the Report was apt to fulfil that purpose and there is no suggestion that it contained information prohibited from publication by s 59.*

*[206] Ground 12 is not made out.*

51. With great respect to her Honour, I am not sure this reasoning is convincing. The real argument is that, put shortly, Division 7 draws a very careful distinction between the various types of reports that it authorises on the one hand and public statements on the other, including specifying and so limiting the persons to whom the ICAC can give a report. The legislature did not intend, so the argument would go, to set at naught that careful structure by permitting a section 55 Public Statement to repeat verbatim,



as occurred here, the entire content of a report and thus give it a wider audience than permitted for the report itself. Be that as it may, her Honour has decided the issue and the ICAC is entitled to rely upon that decision. It seems to me preferable, however, that the ICAC avoid in future the practice in question and limit Public Statements under section 55 to short summaries of the report in question. I have discussed this issue with Commissioner Riches and he has informed me that he accepts that to be the better course.

52. It would be difficult to assess the conduct of the DTCI Investigation as satisfactory under section 135 of the ICAC Act. In summary, I upheld News' complaint about the use of the text message which revealed a denial of procedural fairness by the ICAC as well as a lack of competence on the part of ICAC staff, Kelly J found a denial of procedural fairness in the Moriarty proceedings, and there are the clandestine recordings which, if not illegal, were clearly inappropriate, as I have said. As a result of the Moriarty decision and the compromise with the other persons who had commenced proceedings, Commissioner Riches felt compelled to withdraw the DTCI Public Statement. On the other hand, Commissioner Riches has clearly addressed the issues thrown up by the DTCI Investigation (which occurred before his tenure) and I assess the likelihood of similar issues arising as low.

## 7. Complaints

53. As I have indicated above, section 135(1)(b) of the ICAC Act specifies that my functions as Inspector include receiving and dealing with complaints about the ICAC. Section 138(3) empowers me to deal with a complaint in any manner I consider appropriate. While there are no criteria specified for dealing with complaints (an issue Mr Shanahan has addressed in his Discussion Paper), I consider, nevertheless that a complaint may only be upheld if it demonstrates some form of impropriety or erroneous approach, whether factually or legally on the part of the ICAC. Certainly, it is not enough, for example, that I might not have reached the same decision as that which is the subject of the complaint. Further, because a decision by the ICAC to undertake an investigation involves a correlative decision by the ICAC to expend its limited resources, I consider that the ICAC must be permitted a wide discretion as to which matters it decides to investigate or not. Thus, I would require some form of impropriety on the part of the ICAC to be convincingly established before I upheld a complaint about a failure on its part to investigate a complaint to it. These principles have guided, and will continue to guide, my approach to dealing with the complaints

made to me.

54. In the following paragraphs I will set out the complaints I regard as sufficiently significant to be drawn to the attention of the Chief Minister and, through her, to the Legislative Assembly. In some cases, I have anonymized the name of the complainant. In choosing to do so or, alternatively, choosing not to anonymise the name, I have taken account of sections 91-93 of the ICAC Act and, particularly, sub-section 93(2) which provides that the concept "protected communication" only extends to:

*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.*

55. I received a complaint from Complainant B on 7 July 2021 concerning the circumstances in which the ICAC retained an external investigator, David McGinlay. I dismissed this complaint on 24 August 2021, for reasons I expressed as follows:

- 1. I have considered your complaint as set out in your letter to me dated 7 July 2021 which you particularise as follows:*

*A serious failure by NT ICAC to initiate thorough probity checks in relation to Mr McGinlay. Further, competent research into Mr McGinlay's background would have demonstrated he was not and is not a fit and proper person to perform investigative duties on behalf of the NT ICAC.*

*I have made enquiries of the Office of the Independent Commissioner against Corruption ("OICAC") and, based on the information supplied to me by the OICAC, have decided to dismiss your complaint. My reasons for doing so are set out in the following paragraphs. Given the view I take the matter, I did not think it necessary to make enquiries of Mr McGinlay and have not done so.*

- 2. The first reason is that I consider there is now no satisfactory reason for determining your allegation that Mr McGinlay is not a fit and proper person to perform services on behalf of the OICAC. The recently appointed Commissioner, Michael Riches, has decided to dispense with external contractors and to ensure that all the functions of the OICAC are performed in-house, including investigative functions of the type previously performed by Mr McGinlay. As a result, the OICAC is no longer using Mr McGinlay's services and will not do so in the future.*

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*In these circumstances, I see no utility in deciding the question which you raise as to whether Mr McGinlay was a fit and proper person to perform investigative services for the OICAC.*

*3. In this connection, it is important to understand the powers which the legislation grants to the Inspector. Section 138 of the Independent Commissioner Against Corruption Act 2017 of the Northern Territory sets out the Inspector's powers in the following terms:*

*(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.*

*4. While the powers granted are unquestionably wide, I consider that I am required to focus on matters involving the operational integrity of the OICAC, as it says on the website of the office of the Inspector (<https://oiicac.nt.gov.au>):*

*There is no express description of, or limitation on, the type of conduct by the ICAC or ICAC staff members which may be the subject of complaint to the Inspector under the Act. It may be assumed, however, that the Inspector would only deal with a complaint which involved:*

- a credible allegation of abuse of power, misconduct or other form of impropriety; or*
- a credible allegation of conduct that involved action or failure to act on the part of the ICAC or his staff of a serious nature that is contrary to law; or*
- a credible allegation of unreasonable, conduct, oppressive or improperly discriminatory conduct, or conduct based to some extent on improper motives.*

*5. You do not raise any issue as to the investigative operations of the OICAC and, specifically, do not suggest that Mr McGinlay, or any other OICAC officer has performed his or her functions with anything other than complete integrity. Because your complaint, therefore, appears to me to involve allegations against the OICAC of lack of competence and not any allegation of lack of operational integrity as described above, I do not regard it as requiring me to determine whether the allegations you make about Mr McGinlay are soundly based or not.*

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6. *In this connection, I note that Mr McGinlay was appointed to the staff of the ICAC as a consultant pursuant to section 123(1)(d) of the ICAC Act and was not the beneficiary of any delegation under section 125 of the Act. As such, he could not exercise any of the ICAC's powers under section 32, 33 or 34 of the Act, which could only be exercised by duly authorised staff of the ICAC with appropriate delegations. I am informed, and accept, that in every case when Mr McGinlay's services as an investigator were being utilised, every exercise of such compulsory powers was independently assessed and exercised by the then Commissioner. While I am not suggesting that any person carrying out the OICAC's significant functions should not be held the highest standards of integrity, different considerations apply to the retainer of persons who do not and cannot exercise the ICAC's coercive powers, such as external consultants in the position of Mr McGinlay in contrast to persons who do exercise such powers.*

7. *On the other hand, in your complaint, you challenge the processes by which Mr McGinlay was retained as an external consultant and suggest that such processes were not performed competently. That allegation appears to me to raise a significant issue and one that I should determine. It is of obvious importance that the processes employed by the OICAC are fit for purpose. Having considered this allegation and having investigated the processes in which the OICAC engaged before retaining Mr McGinlay, I have decided that the relevant processes are satisfactory and that there is no basis for impugning the selection process implemented before his appointment as an external consultant.*

56. On 9 July 2021, Matt Cunningham of Sky News wrote to the Office of the Independent Commissioner against Corruption (OICAC) raising queries as to whether it was appropriate for Dr Robyn Smith to be involved in the OICAC's investigation into the DTC grandstand matter in view of documentation which he attached to his email which he asserted appeared "to show their partnership ended in acrimonious circumstances sometime in 2013". The "partnership" to which he was referring was an arrangement for Dr Smith to write a history of the Darwin Turf Club. Dr Smith is, amongst other things, an historian. On the same day, 29 July 2021, the Commissioner referred the matter to me to deal with under powers granted to me by the Independent Commissioner against Corruption Act 2017.

57. I dealt with the matter on 12 October 2021, concluding that there was no basis for the assertions made concerning Dr Smith or her role in the DTC Investigation. In summary form, my reasons for that conclusion were the following:

a. The factual premise underlying Mr Cunningham's implicit suggestion that there was some impropriety in Dr Smith's involvement in the OICAC DTC

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investigation, that is, that the relationship between Dr Smith and DTCl ended in acrimonious circumstances is not established.

b. Nothing in that relationship or its ending operated to create a conflict of interest or some form of partiality or bias on Dr Smith's part so as to render inappropriate her involvement in the DTCl investigation.

c. Dr Smith disclosed to OICAC personnel her previous connection with the DTCl.

d. In any event, even if there were such partiality, she was not involved in the substance of the DTCl Report but had merely a ministerial role so that any such partiality, if it existed, could not have affected the OICAC final report as to the DTC in any relevant way.

58. On 29 March 2022, I received a complaint from Alistair Wyvill SC who raised issued concerning the dismissal by the ICAC of a complaint he had made to the agency concerning the conduct of a Northern Territory Supreme Court judge in proceedings heard in 2015. I dismissed the complaint by letter dated 6 April 2022. Because of the seriousness of Mr Wyvill's allegations concerning the judge in question, I will set out the entirety of my letter dismissing his complaint:

*I have considered the complaint you make concerning the conduct of the Independent Commissioner against Corruption ("ICAC") in your correspondence dated 29 March 2022. I propose to dismiss that complaint for the following reasons:*

*1. The Independent Commissioner against Corruption Act (NT) 2017 specifies (section 135(1)(b)) that my functions as Inspector include receiving and dealing with complaints about the ICAC. Section 138(3) empowers me to deal with a complaint in any manner I consider appropriate. While there are no criteria specified for dealing with complaints, I consider, nevertheless, a complaint may only be upheld if it demonstrates some form of impropriety or an erroneous approach to the legislation by the ICAC. Certainly, it is not enough, for example, that I disagree with the decision which is the subject of the complaint or would have come to a different decision myself. Put simply, it is not the function of the Inspector to reconsider the merits of an ICAC decision in the absence of impropriety or legal error.*

*2. Further, because a decision by the Commissioner to undertake or continue an investigation involves a correlative decision by the Commissioner as to how he expends the limited resources available to him, I consider that the Commissioner must be permitted a wide discretion as to the matters which he decides to investigate and as to when and whether he decides to terminate an investigation which he has already commenced.*

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3. *Further, in dealing with your complaint, I am considering solely the conduct of the Commissioner and how he dealt with your complaint to him. I am not expressing any view about the merits of your complaint to him or your allegations concerning the conduct of Justice Southwood. The legislation does not empower me to do so.*

4. *Nothing in the materials you have provided to me provides any basis for thinking that the Commissioner has engaged in any impropriety or committed any legal error. I consider that the Commissioner was entitled to conclude that there was no evidence to support your allegation concerning Justice Southwood and, in the exercise of his discretion, to determine that his investigation should not be continued.*

5. *I will deal with each of the allegations you make in [7] of your complaint referred to.*

6. *You assert in [7.1]:*

*by stating that he did not find "any evidence to support the contention that Justice Southwood's decision in Lawrie v Lawler was motivated by a desire to ingratiate himself to the Country Liberal Party in order to advance his interests in securing appointment as Chief Justice" the Commissioner has represented to the Judicial Commission that he has undertaken what he considers to be a proper investigation of that matter in the exercise of his powers under the ICAC Act and that the result of that investigation is as he has stated.*

7. *I disagree, for three reasons, as follows:*

7.1 *First, I do not believe that any such representation is conveyed by the Commissioner's statement that he had found no evidence to support your contention. To my mind, that can only be understood as a statement of what in fact it says, that is, that the Commissioner did not find any evidence to support your contention.*

7.2 *Secondly, you yourself do not provide any evidence capable of supporting your allegation either that the Commissioner was wrong in asserting that he did not find any evidence to support your contention or that he had not undertaken a proper investigation of the matter.*

7.3 *Thirdly, I am satisfied that the investigation undertaken by the Commissioner was satisfactory and entirely proper. I do not consider it necessary to set out all the steps taken by the Commissioner during his investigation--some matters appear to me to be confidential and to state others would inappropriately disclose operational matters and procedures. I will state one action taken by the Commissioner in investigating your complaint--he retained interstate senior counsel with no connection to the Northern Territory to assist in the matter and acted upon the advice of such counsel.*

8. *You assert in [7.2]:*

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the truth of the matter however is that the Commissioner did not attempt to conduct and complete, and in fact has not conducted and completed, a proper investigation of any part of my complaint. If that is true and if paragraph 7.1 is correct, he has misled the Judicial Commission, it would appear deliberately.

9. *Once again, I disagree. I am satisfied, as stated, that the investigation carried out by the Commissioner was entirely appropriate. You provide no basis whatever for your assertion that the Commissioner had misled the Judicial Commission "it would appear deliberately". You should not have made so serious an allegation without a substantial basis for it. Such a basis does not appear in the materials you have provided to me.*

10. *You assert in [7.3]:*

alternatively, if the Commissioner has reported in that way to the Judicial Commission because he has attempted to conduct and complete, and believes that he has conducted and completed, a proper investigation of a part of my complaint, then he is mistaken as, amongst other matters, without making any inquiry of me there is no reasonable basis for holding the belief that he has conducted and completed a proper investigation of a part of my complaint.

11. *I disagree. As stated above, the investigation carried out by the Commissioner was entirely appropriate in the circumstances and any such belief is both well-founded and reasonable, in my view.*

12. *You assert in [7.4]:*

to report to the Judicial Commission in these terms, in these circumstances was at least wrong, if not improper, for the Commissioner.

13. *For the reasons expressed above, I disagree with this assertion.*

14. *You assert in [7.5]:*

even if this incorrect, at the very least the Commissioner should have disclosed to the Judicial Commission and to me the basis for his conclusion that he did not find "any evidence to support the contention that Justice Southwood's decision in Lawrie v Lawler was motivated by a desire to ingratiate himself to the Country Liberal Party in order to advance his interests in securing appointment as Chief Justice", including precisely what investigations he undertook, such as to permit the Judicial Commission and interested parties like myself to assess and make submissions in relation to the weight that should be put on his report.

15. *I disagree. A statement that the Commissioner found no evidence to support your contention in relation to Justice Southwood sufficiently indicates its basis without need for further explication. There does not appear to be any basis, either in the general law or Territory legislation for your claim that the Commissioner should have indicated "precisely what investigations he undertook".*

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16. I do not propose to deal in any detail with the allegations you set out in [9]-[15] of your complaint. Suffice it to say that you provide no basis at all for your serious allegations against the Commissioner which I consider you should not have made. I reject those allegations.

I note [17]-[18] of your complaint. Whether you make your complaint public is a matter for you and I do not propose to express any view about it.

Finally, I note that you copied the Judicial Commission and the Attorney General, as well as the Commissioner, with your complaint. In those circumstances, I intend to send a copy of my determination of your complaint to them.

59. Commencing on 26 September 2021 and concluding on 9 October 2021, I received correspondence from Complainant A who raised issues with me concerning what she suggested was a wrongful failure on the part of the ICAC to investigate a complaint she had made in December 2018 about an investigation by the Northern Territory Police Service into the death of her son, including a complaint that the ICAC had failed to provide a rationale for its decision not to investigate. In addition, she made allegations that ICAC staff had conflicts of interest. I notified Complainant A of my decision to dismiss her complaint by email dated 28 October 2021, expressing my reasons in the following terms: ***Powers of Inspector under The Independent Commissioner against Corruption Act (NT) 2017***

*The Independent Commissioner against Corruption Act (NT) 2017 specifies (section 135(1)(b)) that my functions as Inspector include receiving and dealing with complaints about the ICAC and officers of the OICAC. Section 138(3) empowers me to deal with a complaint in any manner I consider appropriate. While there are no criteria specified for dealing with complaints, I consider, nevertheless, a complaint may only be upheld if it demonstrates some form of impropriety or an erroneous approach to the legislation on the part of the ICAC. Certainly, it is not enough, for example, that I disagree with the decision which is the subject of the complaint. Further, because a decision by the ICAC to undertake an investigation involves a correlative decision by the ICAC to expend its limited resources, I consider that the ICAC must be permitted a wide discretion as to which matters it decides to investigate or not.*

***Determination***

*I do not consider that the materials you have supplied to me or the information I obtained from the OICAC provide any basis for concluding that there was any form of impropriety or corruption or legal error on the part of the OICAC in declining to investigate the matters that you raised with it. It seems to me that the OICAC considered the matter appropriately and came to the conclusion, expressed in Ms Collins' emails to you, that you had not provided any evidence or other material capable of establishing a reasonable suspicion that any person had*



*engaged in improper conduct (which includes “corrupt conduct”) within the meaning of the ICAC Act. That is a conclusion with which I agree.*

*I disagree with your assertion that the OICAC did not provide a rationale for its refusal to investigate your complaint. As Ms Collins put it in both her letters to you, you did not provide any, or any sufficient evidence, that “improper conduct” had taken place. That is a rationale and, in my view, a sufficient one for declining to investigate your complaint.*

*As to the other element of your complaint, the assertion that Mr Grant and Ms Collins, had impermissible conflicts of interest, I consider that you have not provided any basis for that allegation. The OICAC informs me that Ms Collins has been with the agency since 2019 and that prior to that she was employed in the Northern Territory Department of Trade, Business and Innovation. Before that appointment, she had been employed as a forensic scientist in the Forensic Services branch of the Northern Territory Police, Fire and Emergency Services. No aspect of Ms Collins’ employment background provides the slightest basis for believing that she is unqualified to deal with matters such as yours or has, in any respect, a conflict of interest. I should say specifically that your assertion that Ms Collins’ position with Police, Fire and Emergency Services and as President of the Australian and New Zealand Forensic Science Society “raises concerns about her ability to assess complaints against NT Police and forensic services” is wrong. In my view, her background supports her suitability for the role as Director of Assessments.*

*Equally, in relation to Mr Grant, the family connections that you mention do not establish that Mr Grant is unsuitable to deal with complaints, to use your words, “that concern areas of justice and policing”. Rather, it appears to me that Mr Grant’s background renders him highly suitable to deal with matters involving Northern Territory Police. If Mr Grant were confronted with a situation where such a family connection was involved, I anticipate that he would disqualify himself or that the Commissioner would arrange matters so that he was not involved. As you yourself point out, the Northern Territory is a small jurisdiction. It is inevitable in a small jurisdiction that there will be connections of some sort, sometimes close, sometimes distant, between people in agencies like the OICAC and other Northern Territory Government agencies. That, of itself, does not give rise to any genuine conflict of interest and certainly not to one that is incapable of being appropriately managed.*

*For these reasons, I have determined to dismiss your complaint.*

## **8. Evaluation of the Performance of the ICAC and the Office of the ICAC**

60. As stated above, this is the third Annual Report that I have prepared since my appointment as Inspector and since the OICAC became fully operational. I prepared,

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in 2019 a Preliminary Report at a time when the OICAC was still substantially in start-up mode. Anyone who wishes may refer to my 2019 Preliminary Report and my 2020 and 2021 Annual Reports to understand the situation of the OICAC for the periods covered in those Reports.

61. The OICAC provided me with its Draft Annual Report for the 2021-2022 financial year on 8 September 2022. I will not repeat or attempt to summarise the Annual Report - it is, or will be, publicly available by the time I present my report. In connection with the point made in the preceding paragraph I note and agree with the content of Mr Riches' Commissioner's Foreword to the 2021-2022 OICAC Annual Report.
62. I note the present organization of the Office of the ICAC which differs from that which applied under the previous Commissioner. There are two main output groups, OICAC Operations on the one hand and Corporate and Governance on the other. OICAC Operations expressed intended outcome is improvement in the integrity of Northern Territory public administration and has five functional units as follows:
  - Executive
  - Legal
  - Assessments
  - Investigations
  - Prevention, Intelligence and Engagement
63. The functions of each of the functional units are as follows:
  - Executive support staff provide administrative and secretariat services to the Commissioner and other directors.
  - The Assessments unit assesses all reports made to the OICAC and recommends what, if any action should be taken. The decision as to what, if any, action is taken rests with the Commissioner or a delegate. The Assessments unit reviews reports back from public bodies regarding ICAC referrals and monitors the implementation of recommendations made by the Commissioner to public bodies.
  - The Investigations unit supports the Commissioner in the investigation of alleged improper conduct as directed by him. A range of methodologies are used to collect evidence, including taking statements, obtaining business and financial records, private examinations and collecting information using traditional and contemporary

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investigative techniques. Investigations are subject to ongoing direction from the Commissioner.

- The Legal Services unit through the General Counsel provides legal advice and support to the Commissioner and OICAC staff. The role acts as Counsel Assisting the Commissioner during private examinations. The General Counsel also supports the Commissioner in discharging his statutory functions by reviewing assessment recommendations, providing legal advice on education and prevention activities, and supporting the Commissioner to meet strategic priorities.
  - The Prevention, Intelligence and Engagement unit delivers awareness, engagement and prevention activities to public sector agencies and local government councils, other organisations and the community. The unit develops prevention and engagement strategies and resources and works with public bodies to increase awareness of improper conduct and foster a culture of reporting.
64. The Corporate and Governance functional unit has as its intended outcome the provision of improved organizational performance through strategic leadership and governance and provision of corporate services functions.
65. As at 30 June 2022, the OICAC had 23 full-time equivalent employees, a decrease from 31 FTEs a year ago when they had increased from 22 FTEs as at 30 June 2020 and 12 a year before that. It had an operational budget of \$7.58 million compared to \$7.47 million for 2020-2021 and \$5.6 million for the 2019-2020 financial year. I note that the Commissioner anticipates a reduction in the OICAC's budget for 2022-2023 and has taken steps, for example, by not filling staff vacancies to deal with that anticipated reduction.
66. I note that the OICAC adopted a Strategic Plan setting out its vision for the period 2020-2023. I note the following matters about the Strategic Plan:
- It expresses the vision of the OICAC as a prosperous corruption-free Territory and its mission as one to support and empower Territorians to prevent, detect and respond to improper conduct.
  - The aims expressed are to reduce improper conduct, demonstrate accountability, strengthen confidence in OICAC and public administration and build organisational capabilities and capacity.
  - The expression of values such as integrity, courage, accountability and collaboration.
67. I evaluate the OICAC's performance in these respects as satisfactory.

## 9. Public and Public Service Education

68. An important aspect of any integrity agency is an educative function. That is, to make known both to the public and public officers the functions of the agency and to emphasise corruption prevention to them so that they clearly understand the necessity for integrity in public office.
69. My evaluation of these functions is that they have been performed satisfactorily by the Office of the ICAC. It is clear that the office has achieved significant penetration into the community and the public service.

## 10. Complaints and Complaint Assessments

In 2021-2022 the OICAC assessed a total of 677 allegations, including an allegation received in 2020-2021. Of the allegations assessed 141 were referred, or are to be referred, to a referral entity. Of those allegations:

- 120 are now closed having been referred to and dealt with by the referral entity
- One matter was referred but is now under investigation by the Commissioner
- One matter was referred but is now the subject of a preliminary inquiry by the Commissioner

Eighteen allegations were, or are the subject of a preliminary inquiry by the Commissioner.

A further 38 allegations were or are the subject of investigation by the Commissioner. The remaining allegations were closed with no further action taken.

70. I am satisfied that the assessment process and the procedures established to deal with the reports are appropriate, as are the operations of the Assessment Unit.
71. In summary, my evaluation of these matters is that the Office of the ICAC is dealing with them in a satisfactory manner.

## 11. Investigations

72. I note the following passage from the OICAC draft 2021-2022 Annual Report:

*The unit had nine FTE staff at 30 June 2022:*

- Director, Investigations
- Manager, Investigations (2)

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- *Senior Investigator (5)*

- *Investigation Support Officer.*

*The unit committed its resources to improving existing policies and procedures, and commenced the initial phase of the agency's new operations compliance framework.*

*The unit has undertaken significant work to build capacity with all matters now investigated internally. Reliance on external investigators has discontinued.*

73. I note, also from the draft Annual Report that in the period 1 July 2021-30 June 2022, that, at the start of reporting period, the ICAC had 56 active investigations. One investigation was finalised prior to Commissioner Riches' commencement. Commissioner Riches commenced 17 investigations during the period, of which three investigations were joint investigations with another agency. Shortly after commencing as Commissioner, Commissioner Riches reviewed all investigations current at the time and, as a result of that review, determined to close 33 investigations, either because the Commissioner did not consider the matter warranted investigation, it had already been investigated, or it was not within jurisdiction. A further 11 ICAC investigations were referred to another body. The Commissioner adopted 11 investigations. 55 investigations were finalised during the reporting period and a further 17 investigations have been carried forward into the new financial year.

## 12. Some Qualifications

74. It should be apparent from what I have written above that I evaluate the manner in which the OICAC performed its significant public functions in the financial year 2021-2022 as generally satisfactory. That conclusion applies to the conduct of the agency in the reporting period 1 July 2021-30 June 2022. It will be apparent from the views I have expressed above particularly in [51] that I take a different view about matters which occurred before the commencement of the present Commissioner's term of office.

## 13. Conclusion

75. I am satisfied that the Office of the ICAC, the Commissioner himself and his staff have acted within power and in compliance with the Act and other relevant legislation and I evaluate the performance of the OICAC overall as satisfactory for the relevant reporting period, that is, 1 July 2021-30 June 2022.



Bruce McClintock

Inspector ICAC