General Report

Section 48 – *Independent Commissioner Against Corruption Act 2017*

Michael Riches
Independent Commissioner Against Corruption

July 2022

Office of the Independent Commissioner Against Corruption NT

Letter of transmittal

The Honourable Mark Monaghan MLA
Speaker
Legislative Assembly of the Northern Territory

Dear Mr Speaker

I submit a report in accordance with section 48 of the *Independent Commissioner Against Corruption Act 2017* (NT) (ICAC Act).

In accordance with section 49(3) of the ICAC Act, I recommend that this report be made public immediately. If you do not accept the recommendation then I note section 49(2) of the ICAC Act requires you to table the report in the Legislative Assembly within six sitting days after you have received it.

Yours sincerely

Michael Riches
Independent Commissioner Against Corruption

27 July 2022

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Introduction

Section 48 of the *Independent Commissioner Against Corruption Act 2017* (ICAC Act) permits me to make a general report addressing matters of the kind contemplated in section 48(1).

Section 48(4) of the ICAC Act states that I may provide my report to 'a public body or public officer that the ICAC considers would be assisted by the report or the Speaker of the Legislative Assembly'.

I have decided to make this report to the Speaker of the Legislative Assembly so that the Parliament, public officers and the public can be apprised of its content.

Review of the Batchelor Institute of Indigenous Tertiary Education

Section 48 (1)(a): Report in relation to a review

Section 23(1) of the ICAC Act provides that I:

> may, at any time, audit or review the practices, policies or procedures of a public body or public officer to identify whether improper conduct has occurred, is occurring or is at risk of occurring.

I have completed a review of that kind in respect of the Batchelor Institute of Indigenous Tertiary Education (the Institute). I made 27 recommendations. I am pleased that the Institute has indicated its in-principle support for all of my recommendations.

In accordance with section 57 of the ICAC Act, I have requested the Institute to advise me by mid-September of its position in respect of my recommendations and the steps taken to implement them. Assuming I am satisfied with the steps taken, I intend to present a summary of the review and my recommendations in a general report to Parliament.

Impropriety in recruitment and selection

Section 48(1)(b): Systemic issues identified in one or more public bodies in relation to improper conduct

In my last general report to Parliament, I commented on impropriety in recruitment. Anomalies in recruitment processes is a familiar theme in reports to my office. Indeed, we have received more than 140 direct allegations of impropriety in recruitment, and many other reports where impropriety in recruitment has been implied. Reports span a wide variety of public bodies across the Northern Territory.

The three public bodies that are the subject of most allegations to my office relating to impropriety in recruitment (in order from highest to lowest) are the:

- Department of Health
- Department of Education
- Northern Territory Police, Fire and Emergency Services.

A number of themes emerge from allegations made to my office. Those themes include:

- favouritism, nepotism and cronyism

- selections made on a basis other than merit
- embellishing or falsifying information in employment applications
- appointing persons without a selection process where such a process should have been applied
- failing to appropriately manage conflicts of interest in respect of selection processes.

In 2021, a survey conducted by the Commissioner for Public Employment asked respondents whether they agreed with the following statement:

> 'Recruitment and promotion decisions in my workplace are based on merit.'

The three public bodies with the highest number of 'disagree' responses were:

- Northern Territory Police, Fire and Emergency Services (57%)
- Power and Water Corporation (37%)
- Jacana Energy (35%).

In fact, 26% of all respondents to the survey disagreed with that statement. That should be cause for concern.

Of course, the making of allegations in a report to my office, or a response to a survey, cannot be taken as truth of the nature or extent of impropriety in a public body. Nevertheless, it does give a useful indication, at the very least, of perceived improper conduct in that body.

Perceived impropriety in respect of selection decisions can have a significant adverse effect on morale in an organisation. Likewise, the selection of an unsuitable candidate creates its own difficulties.

There are four aspects of recruitment and promotion that I will touch upon in this report.

First, impropriety by those who apply for positions.

Second, impropriety in respect of selection decisions, including asserted nepotism and favouritism.

Third, the importance of robust selection processes.

Finally, the ability to identify applicants who may have previously been the subject of disciplinary action in public administration.

Impropriety by applicants

Matters have come to my attention, both in this jurisdiction and elsewhere, where an applicant for a position has falsified their qualifications or experience. In some cases, individuals have won selection based upon those falsehoods. In the Northern Territory, such conduct may be corrupt conduct. Such matters have been, and are, the subject of inquiry by my office.

Section 10(4) of the ICAC Act provides that a person engages in corrupt conduct where their conduct could impair public confidence in public administration and involves:

> (e) dishonestly obtaining or retaining employment or appointment as a public officer.

An applicant who falsifies their application, or aspects of their application, alters what should be a level playing field. If their dishonesty is not detected at the earliest opportunity, fairness in the process can be lost and the true meritorious applicant may not be selected.

The risk of appointing a person to a position based upon a dishonest application places the organisation at risk of having to address the consequences, including having to engage in processes to remove the individual, and the time and cost associated with repeating the recruitment process.

Moreover, the dishonest but successful applicant may not bring the skill and experience required for the position, further disadvantaging the organisation's productivity and effectiveness.

For those reasons, it is essential that public bodies develop and implement suitably robust recruitment processes to verify the accuracy of claims made by applicants. Where a suspicion arises regarding the veracity of an applicant's stated qualifications and experience, those suspicions must be addressed and the veracity of the claims properly tested.

Where it appears that an applicant has falsified aspects of their application, that fact should be brought to my attention.

Impropriety in selection decisions

The most common recruitment-related allegations raised with my office are suggested nepotism, favouritism and cronyism.

Preferential treatment of applicants based upon familial or social connections, circumventing any recruitment processes to achieve a desired outcome, or undermining established processes to ensure a pre-determined selection, are issues that figure prominently in reports to my office.

Such circumstances often arise, or may be perceived to have arisen, because of an actual or perceived conflict of interest on the part of panel members or decision-makers. Failing to disclose and adequately manage an actual or perceived conflict of interest in a selection process will inevitably bring into question the fairness of that process.

Moreover, failing to manage adequately an actual or perceived conflict of interest could amount to corrupt conduct, or misconduct, under the ICAC Act.[1]

There is no place in public administration for nepotism, cronyism or other impropriety by those involved in recruitment and promotion processes. Such conduct undermines the integrity of the process, clouds the reputation of the successful candidate, and can damage staff morale. Circumventing or improperly avoiding robust selection processes ought to raise a question in any person's mind about the appropriateness of the selection.

Such matters ought to be brought to my attention.

The importance of robust selection processes

It follows that a proper, robust and fair selection process is necessary to ensure meritorious selections.

[1] See sections 10 and 11.

In so far as employment in the public sector is concerned, section 5D of the *Public Sector Employment and Management Act 1993* provides:

> (1) The ***merit principle*** is that the employment of a person as an employee, or the promotion or transfer of an employee, under this Act must be based solely on the person's suitability:
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> (a) to perform the relevant duties; and
>
> (b) for employment in the relevant workplace; and
>
> (c) for employment in the Public Sector.
>
> (2) A person's suitability is to be determined having regard to the person's:
>
> (a) knowledge; and
>
> (b) skills; and
>
> (c) qualifications and experience; and
>
> (d) potential for future development.

No doubt, the concept of merit is similarly applied in other parts of Northern Territory public administration.

A selection based upon a proper process will ensure the selection is free of improper influence and that the candidate's suitability has been properly assessed.

To ensure consistency and clarity, agencies should have in place recruitment and selection policies.

Indeed, the Commissioner for Public Employment - Employment Instruction Number 1 provides that:

> A Chief Executive Officer must develop a procedure for the filling of vacancies consistent with the Act, its subordinate legislation and any relevant award or enterprise agreement.

I have been surprised to find that a number of government agencies do not have such a procedure. The absence of a documented recruitment and selection procedure is a risk for the public body and it should be rectified.

All agencies should have a policy or procedure in place that governs the process for recruitment and selection. The procedure should address each stage of a selection process, set out the requirements for verifying the skills and qualifications of applicants, and address the mechanism by which actual or perceived conflicts of interest must be declared, documented and managed.

Public bodies may be assisted in that endeavour by reviewing the Merit Selection Training Manual, and Pre-Employment Screening Guideline, both prepared by the Commissioner for Public Employment and available on that Commissioner's website.

Recruitment of former public officers following disciplinary action

Public officers whose employment has been terminated because of improper conduct, or who have resigned during an investigation into such conduct, may seek further employment in a different public body.

My predecessor recommended the establishment of a register to record public officers whose employment had ceased as a consequence of disciplinary action. The register would allow for checks to be conducted should that individual seek further employment elsewhere in public administration.

A similar recommendation was made in South Australia many years ago. A register of that kind has since been established in that jurisdiction.

As I understand it, following my predecessor's recommendation work was undertaken by the Commissioner for Public Employment. That work is continuing. In any event, the Commissioner for Public Employment deals only with Northern Territory Government employment. To be effective, a register of the kind suggested would need to capture Northern Territory Government, as well as other public bodies, such as local councils.

In my opinion, a register ought to be established in the Northern Territory in which a record is kept of a public officer whose employment has been terminated because of improper conduct, or who has resigned prior to the conclusion of a disciplinary process. It should cover, at least, employment in the Northern Territory Government and local councils. The register ought to be available to authorised representatives of public bodies in order to determine whether an applicant is recorded and to access the circumstances of past proven conduct.

While the information contained in the register may not be an immediate barrier to further consideration of an applicant, it is, nevertheless, relevant to the decision maker's consideration and ought to be available.

Investigation reports vs public statements

Section 48(e)(iii): Current or proposed laws of the Territory

Much has been made of my recent decision not to republish a public statement prepared by my predecessor.

In light of commentary in the media about the meaning and effect of my decision, much of which has been inaccurate, I think it prudent to explain certain provisions of the ICAC Act, their challenges and the proposals I have made for legislative amendment. I do not intend to comment on the recent matter.

At the conclusion of an investigation, the ICAC may prepare an investigation report in accordance with section 50 of the ICAC Act. That section provides that an investigation report may contain findings of improper conduct. The obligation to afford procedural fairness in respect of affected persons is also addressed in section 50.

I may make the investigation report to a responsible authority, as defined in sub-section (7). There is no mechanism by which an investigation report can be published.

I think I should have the power to publish an investigation report. I have proposed to the government that section 50 be amended to permit me to do so.

Separately, section 55 provides that I may make a public statement.

A public statement is not the same as an investigation report. They are two different things.

A public statement may only be for a purpose specified in section 55 of the ICAC Act.

A public statement is, as its name suggests, a means to communicate certain information publicly. It is not the repository of findings made.

Whether or not a public statement is made, or made and later removed, has no effect on findings that have been made following an investigation, nor on the content of an investigation report.

Greater clarity would ensue if I were permitted by the legislation to publish a completed investigation report, which would include any findings made and a fair representation of the responses provided by persons against whom adverse findings have been made.

However, there is a further difficulty with the legislation as it is presently constructed.

Section 59 relevantly provides that:

> (1) This section applies to the following:
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> (a) A general report;
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> (b) an investigation report made to the Speaker or Deputy Speaker;
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> (c) a public inquiry report;
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> (d) a report under section 54;
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> (e) a report concerning recommendations;
>
> (f) a public statement.
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> (2) The report or public statement must not contain material that would not be admissible in civil, criminal or disciplinary proceedings because of section 82, unless the material is already in the public domain.

I have relied heavily on the power to examine persons for the purposes of my investigations. That will continue. At an examination, I generally require the witness to answer questions asked of them. Their answers may form a substantial basis for the findings made.

Because I compel witnesses to answer questions, section 59 mandates that any public report or public statement not contain the evidence they have given. Such a restriction makes it difficult, in any public communication, to set out the evidence upon which I may have based a finding. While I could attempt to do so without resort to the actual evidence given, such a process would not be without difficulty and would deprive the reader of understanding the evidence itself.

The current position is, in my view, most unsatisfactory. I am not aware of a similar restriction elsewhere in Australia.

I have recommended to the government that this restriction be removed. If both my recommendations are accepted, I would be able to publish an investigation report that contains a proper account of the evidence relied upon. Until those changes are made, there will be ongoing difficulty with my ability to publicly communicate the outcome of my investigations in a meaningful and fair way.

I hope the Parliament addresses these issues.

Access to Cabinet-in-confidence documents

The ICAC Act imposes constraints upon my ability to receive documents that relate to Cabinet. Section 79 of the ICAC Act deals with privileged or confidential information. Specifically, section 79(2) relevantly says that a person is not authorised or required by the ICAC Act:

> …
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> (b) to disclose confidential information about the decisions, proceedings or deliberations of:
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> (i) the Executive Council or a committee of the Executive Council; or
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> (ii) the Cabinet or a committee of the Cabinet; or

(c) to disclose confidential information about communications among members of the Executive Council or Cabinet or among Australian governments; or

(d) to produce a document or to disclose information about a document that is exempt under section 45(1)(a) of the *Information Act 2002*.

The effect of section 45(1)(a) of the *Information Act 2002* is to extend the operation of section 79(2) of the ICAC Act to information that:

(i) was brought into existence for submission to and consideration by an Executive Body, whether or not it has been submitted to or considered by the Executive Body; or

(ii) was brought into existence to brief a minister in relation to a matter to be considered by an Executive Body; or

(iii) was considered by an Executive Body: or

(iv) is an agenda, minute or other record of the deliberations or decisions of an Executive Body; or

(v) would disclose information about the deliberations or decisions of an Executive Body, other than information that has been published in accordance with a decision of the Executive Body; or

(vi) would disclose a communication between ministers about the making of a decision or the formulation of a policy if the decision or policy is of a kind generally made or endorsed by an Executive body; or

(vii) was brought into existence to brief a minister in relation to a matter the subject of consultation between minister about the making of a decision or the formulation of a policy if the decision or policy is of a kind generally made or endorsed by an Executive Body; or

(viii) is a draft of information mentioned in subparagraph (i), (ii), (iii), (iv), (v), (vi) or (vii) …

As can be seen, this is a significant list.

Some time after commencing as Commissioner, I received information alleging that the content of a cabinet submission had been edited by a public officer so as to be misleading as to the true state of affairs. I considered it to be a serious allegation that warranted investigation. I commenced an investigation and obtained some background information about the subject matter. However, given the constraints imposed by section 79(2) of the ICAC Act, I was not in a position to compel or otherwise require a person to provide me with the cabinet submissions relating to the matter. I could also not obtain first-hand information regarding what had actually occurred from those who had a role to play in the preparation of the submission.

Of course, without access to the Cabinet submission itself, it would not be possible to advance the investigation.

I met with the then-Chief Minister and invited him to consider providing me with the Cabinet submissions relevant to the matter and to permit persons with knowledge of the submission to speak to me about it. During that meeting I handed the then-Chief Minister a letter addressing the issue and outlining my request.

Ultimately, the then-Chief Minister declined my request. As he was entitled to do, the then-Chief Minister referred to the restriction in section 79(2).

I do not criticise the then Chief Minister for that response. He was entitled to respond in that way because he was entitled to rely upon a provision passed by the Parliament.

Nevertheless, that decision has meant that my investigation had to be closed.

In more recent times, I received material in respect of a different matter that appeared to be captured by section 79(2). I wrote to the current Chief Minister regarding that material. The Chief Minister determined not to press a claim of privilege in respect of the material, thus allowing me to read and consider it.

While I do not think it is for me to propose an amendment to section 79(2), I thought it appropriate that the Parliament understands its practical impact.

ICAC budget

Section 48(e)(iv): Adequacy of resources available to the ICAC

During my recent appearance before the Estimates Committee, I commented upon the resources available to my office, noting this year's budget is around 20% less than for the previous financial year.

I have since met with the Chief Minister to discuss a number of matters, including the resources available to my office. I was pleased that the Chief Minister expressed her commitment to ensuring my office is properly resourced and that the legislation under which I operate is fit for purpose.

Following my meeting with the Chief Minister, I have written to her in respect of my resources. I look forward to receiving the Chief Minister's response in the near future.

Contact the ICAC

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