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Dear Dr Daly

RE: Submission in respect of the exposure draft of the ICAC Bill

Thank you for the opportunity to make a submission in respect of the exposure draft of the Bill to amend the *Independent Commissioner Against Corruption Act 2017* (the exposure Bill).

I take the view that a statutory office holder ought not comment about matters of policy, unless it is a necessary incident of the discharge of statutory functions, or is otherwise a matter of such significance as to warrant a departure from the norm.

It is not my intention to publicly support or oppose any of the proposed amendments. Ultimately that is a matter for Parliament, after considering the Bill and hearing from a broad range of stakeholders.

However, I thought it would be beneficial to the debate to explain, from my perspective, the practical effect of a number of key proposed amendments. For that reason I intend to publish this submission.

I do not intend to comment upon all of the proposed amendments. No conclusion ought to be drawn from my decision not to comment upon a particular provision.

The exposure Bill

The exposure Bill contains 54 clauses and a schedule. Not only would it amend the *Independent Commissioner Against Corruption Act 2017* (ICAC Act), but it would amend the *Court Security Regulations 1998* and the *Evidence (National Uniform Legislation) Regulations 2012*.

I set out my submission by reference to the clauses in the exposure Bill.

Clause 4 - Legislative Objects

Clause 4 would repeal and replace the objects of the ICAC Act. The clause largely replicates the words already appearing in section 3.

The primary change is the inclusion of sub-section (3), which provides that the Act primarily empowers the ICAC to investigate cases of corrupt conduct and anti-democratic conduct, while empowering referral entities to investigate cases of misconduct and unsatisfactory conduct. It is not clear how referral entities are so empowered, other than to the extent that a referral itself might be said to enliven some jurisdiction that does not otherwise exist in the referral entity.

Other parts of the legislative objects, as currently drafted, would be amended and moved to the provision that sets out the Commissioner's functions.

Clause 7 – Commissioner's functions

Section 18 of the ICAC Act prescribes the statutory functions given to the Commissioner. Clause 7 of the exposure Bill would insert a new sub-section 18(1AA).

Sub-section (1AA) appears more akin to statutory objects, rather than statutory functions given to the Commissioner.

Section 18 would be further amended by the insertion of sub-section (3A). This new sub-section would provide that, despite the words contained within section 18(2), the Commissioner would retain the discretion to decide which matters of improper conduct to investigate under the ICAC Act. However, the new sub-section would in large part be defeated because of the provisions to be inserted by clause 8.

Clause 8 – Limitation on functions

Clause 8 of the exposure Bill would insert a new section 18A into the ICAC Act.

The effect of section 18A would be to prohibit me from investigating, or continuing to investigate, alleged misconduct or unsatisfactory conduct unless certain statutory thresholds are satisfied. Those thresholds are prescribed in sub-sections (a) and (b).

There are a number of practical considerations relevant to clause 8.

The first is the inclusion of the words 'or continue to investigate'. The issue is best explained by reference to a practical example.

I may conduct an investigation into an allegation of corrupt conduct. I may expend considerable time and resources gathering evidence relevant to that matter. As the investigation unfolds, it may become clear that the conduct is more likely to amount to misconduct or unsatisfactory conduct. That position might not materialise until the preparation of an investigation report, having had benefit of considering all of the evidence and party's submissions. The practical question thus arises: what am I to do?

If the amendments are made, an investigation could only proceed if one of the criteria in sub-section (a) or (b) are satisfied. There is no difficulty with (a). But (b) presents a number of challenges.

Sub-section (b) provides that an investigation can continue if:

The gravity of the matter is such that it warrants the use of the powers and resources given to the ICAC because:

> *(i) the person alleged to have engaged in the misconduct or unsatisfactory conduct is or was an MLA or the Chief Executive Officer or head of an Agency or a government owned corporation;*
> *(ii) there is a significant degree of harm to the Territory arising from the misconduct or unsatisfactory conduct; or*
> *(iii) the alleged misconduct or unsatisfactory conduct gives rise to a suspicion of systemic misconduct or unsatisfactory conduct.*

It is not clear whether the thresholds are matters for the Commissioner's subjective determination, or whether some other test applies.

Sub-section (b)(ii) refers to the Chief Executive Officer or head of an Agency. An Agency is defined in the *Interpretation Act 1978* to be:

A department or unit of a department, or other authority or body:

> *(a) nominated as an Agency in an Administrative Arrangements Order; or*
> *(b) declared by an Act to be an Agency for the Public Sector Employment and Management Act 1993 or the Financial Management Act 1995.*

The effect is that sub-section (b)(i) would not capture a number of heads of public bodies, including Chief Executive Officers of local councils, the Chief Executive Officer of Batchelor Institute of Indigenous Tertiary Education, the Vice Chancellor of Charles Darwin University and head of entities of the kind captured by section 16(1)(l) of the ICAC Act.

Sub-section (b)(ii) establishes a threshold of 'serious degree of harm' to the Territory. It is not clear how that threshold is to be established. Is it a subjective determination by the Commissioner? What is meant by 'serious degree of harm'?

The word 'harm' is already defined in the ICAC Act:

> ***Harm:***
>
> *(a) generally – includes any of the following:*
> *(i) injury, loss or damage;*
> *(ii) intimidation or harassment;*
> *(iii) discrimination, disadvantage or adverse treatment (including disciplinary action), in relation to employment, career, profession, trade or business; or*
> *(b) for protection of protected persons – see section 112(4).*

It is not clear whether this definition has been contemplated in respect of the proposed sub-section.

Sub-section (b)(iii) introduces the concept of a suspicion, but it is not clear in whose mind that suspicion is to be held.

Clause 12 – Notices to attend for examination

Clause 12 would make amendments to section 34 of the ICAC Act. Section 34 provides for the issuing of a notice compelling a person to appear at an examination and give evidence.

Section 34 imposes certain requirements on the content of a notice. One such requirement is to state 'the nature of the matters about which the person is to be questioned'.[1] That requirement can be displaced where 'the ICAC considers on reasonable grounds doing so would:

> *(i) be likely to prejudice the conduct of the investigation; or*
> (ii) *be contrary to the public interest.*

The 2017 explanatory memorandum to the ICAC Bill had this to say:

> *The person is generally entitled to know the general nature of the matters about which the person is to be questioned. The ICAC has some discretion as to how much detail it provides the person as to the nature of the questions to be asked. In particular, the ICAC does not have to notify the person as to the nature of the matters about which the person is being questioned if an explanation about such matters would prejudice the conduct of the investigation (e.g. may lead to the destruction of evidence or opportunity to prepare tailored answers), or would be contrary to the public interest (e.g. may risk revealing highly confidential government information, or may risk revealing the identity of a whistleblower).*

During my predecessor's tenure, and during my tenure, arguments have arisen as to what is meant by 'the nature of the matters about which the person is to be questioned', and the extent to which the face of a notice complies with that obligation.

At some stage I expect that issue will be challenged on judicial review.

Clause 12 of the exposure Bill would insert a new sub-section 5 into section 34 of the ICAC Act. Sub-section 5 refers to "particulars or full particulars". It is not clear what is meant by particulars or full particulars. Those terms are not otherwise used in section 34.

Given there has been an identified need to include sub-section (5), and the fact that disputes have arisen about what is required to be disclosed in order to satisfy the requirement to 'state the nature of the matters about which the person is to be questioned', I respectfully recommend that the opportunity is taken to provide additional statutory clarification as to what is required to be provided by way of information to a person who is to be examined. Such clarification would be beneficial to my office, for witnesses who are required to attend for examination and for those who represent witnesses.

I urge consideration be given to the words in section 34(2)(b).

[1] Section 34(2)(b).

Clause 15 – Public inquiry

Clause 15 would amend section 50 of the ICAC Act to insert a new sub-section (1A). The inclusion of the sub-section would compel the Commissioner to prepare an investigation report where an investigation has involved the holding of a public inquiry. However, there is no commensurate obligation to publish that investigation report. The question of publication of any investigation report remains a discretionary matter for the Commissioner.

It might be considered odd that the Commissioner could hold a public inquiry but then not be obliged to publish the mandatory investigation report.

Cause 16 – Publication of Investigation Reports

Clause 16 would introduce a new section 50A. The effect of that section would be to permit the publication of an investigation report. The existing mechanism for transmission of certain kinds of investigation reports to the Speaker (or Deputy Speaker), and its subsequent tabling in the Legislative Assembly, is preserved.

There are certain restrictions that would apply to the content of a published investigation report. They are specified in sub-section (2).

However, the use that can be made of compelled evidence in an investigation report would become inconsistent.

Clause 20 – use of compelled evidence in statements and reports

Clause 20 would amend certain parts of section 59 of the ICAC Act. Section 59 constrains the use that can be made of certain evidence in respect of certain reports and statements. Put simply, section 59 constrains the use that can be made of compelled evidence in a report or statement specified in that section.

It is important to clarify the effect of the proposed amendments.

As I have already said, clause 16 would insert a provision that would permit the publication of an investigation report, while preserving the mechanism for making an investigation report to the Speaker or Deputy Speaker. That mechanism would apply where the subject of the investigation report related to a current or former minister or Member of the Legislative Assembly.

The effect of section 59, as amended, would be to create a two-tiered system in so far as the use of compelled evidence is concerned.

By operation of section 59(1)(b), I would not be permitted to include compelled evidence in a report to the Speaker or Deputy Speaker.[2] However, because section 59 does not include reference to an investigation report published under the new section 50A, there would be no impediment to including such evidence in a report published under that new section.

In other words, a report about a current or former minister or member of the Legislative Assembly could not include reference to compelled evidence, but a report about other public officers could. Because the new section 50A would include sub-section (3), I could not rely upon section 50A to publish a report that should be made to the Speaker or Deputy Speaker.

It should be considered whether that is the desired outcome.

In recent times, I made a public statement about findings of corrupt conduct made against a public officer. I did not publish my investigation report because there is currently no statutory power to do so. I did not name the public officer in my public statement. I was not permitted to include in that public statement the compelled evidence that largely formed the basis for my findings. I take the view that it would be most

[2] Except to the extent that that evidence is already in the public domain, or satisfies the new sub-section (4).

unfair to publish the name of a person about whom adverse findings have been made without also being able to publish the evidence upon which I made those findings.

To the extent that any amendments constrain my ability to publish compelled evidence, and where I have largely relied upon that compelled evidence to made findings, it is unlikely that I will publish an investigation report. In my view, an investigation report needs to explain how I have come to my findings. Where those findings rely heavily upon compelled evidence, the report ought to include that evidence. If I cannot publish that evidence, I would be unlikely to publish the report.

While I may still publish a public statement about a matter, I anticipate adopting the same course as that previously taken.

Clause 25 – power to obtain information or items

Clause 25 would insert a new section 75(6). The effect of that new sub-section would be to substantially impact upon the utility of the section.

Section 75 currently permits an authorised officer to require a public body or public officer to answer specified questions, provide specified information or to produce specified items. That power can be used in respect of the performance of functions under the ICAC Act, in contrast to other provisions that may only be used for the purposes of an investigation.

Section 75 is a power available for the purposes of conducting a preliminary inquiry of the kind contemplated in section 24 of the ICAC Act. A preliminary inquiry will often be conducted in order to determine whether an investigation should ensue. If enacted, sub-section (6) would have the effect of preventing the use of any information or items obtained under section 75 for the purposes of an investigation. If that constraint exists, there would be little point in using section 75.

The question of section 75 was raised in previous discussion with staff of your Department. It appears that discussion may have resulted in a misunderstanding as to a suggestion I made. I suggested that, if there is a concern about the use of section 75, it could be amended to prohibit its use for the purposes of an investigation. That is in contrast to a prohibition on the use of information or items produced as a consequence of the exercise of that power.

Clause 29 – Protected communications

Clause 29(4) would add new provisions to section 93(3). If enacted, section 93(3)(d) may create confusion. That is because protected communications can arise in circumstances where the ICAC has never had any involvement. In other words, a protected communication can exist even where the content of the communication is not being investigated by the ICAC nor referred by the ICAC.

Clause 29 would also insert a new sub-section (4A). The effect of that sub-section would be entirely at odds with section 93(3)(c), which does not appear to be contemplated for removal.

Moreover, sub-section (4A)(a) allows a person making a report to indicate, at the time of making the report, or subsequently, that the information being provided is protected communication (the indication). No parameters are specified in respect of the words ‘or subsequently’.

Because the requirement to give the indication need not coincide temporally with the making of the communication, the recipient of the communication will almost certainly face the dilemma of how to deal with the communication. The amendments do not specify a time constraint on the giving of the indication. One can readily see the challenges that would be presented if the maker of a communication gives the indication some months after the original making of the communication. The practical challenges associated with that amendment are not insignificant.

Finally, sub-section (4A) makes reference to the making of a ‘report’. It is not clear what is meant by a report, and whether that is a concept different to the making of a report of a kind provided for in section 22.

Clause 33 – Protections afforded to Inspector

Clause 33 would insert a new section 134A into the ICAC Act. That provision would provide protections to the Inspector. Those protections would be in different, and more substantial, terms than those afforded to the ICAC. It is not clear why the protections would differ.

Clause 40 - Confidentiality

Clause 40 would repeal and replace section 145. A defence to the offence against sub-section 1 includes that "the disclosure is authorised in writing by the ICAC or the Inspector".[3] I query whether the question of authorisation in writing is better placed in sub-section (1)(c), rather than as a defence.

Clause 43 – Confidentiality notices

Clause 43 would amend section 147 of the ICAC Act. Despite the amendments, neither the ICAC nor the Inspector would be empowered to permit disclosure of information that would otherwise be captured by a direction under section 147. For example, there may be occasion where a person issued with a direction under section 147 may seek to make a disclosure to a person other than a person captured by sub-section 5. There is no mechanism in the section to allow the Inspector or the ICAC to give that permission.

Other matters

Clause 9 would amend the wording in section 23. Consideration should be given to whether the same amendments should be made to section 110.

Clause 19 would amend section 55. The term 'public statements' would be replaced with 'statements'. However, sections 59 and 130 retain the use of the word 'public'.

Clause 30 would amend section 98. Consideration should be given to whether similar amendments ought to be made in other sections, such as sections 96 and 106.

Clause 40 would replace section 145. The new section omits the defence of obtaining professional assistance from a health practitioner. It is not clear why that would be omitted.

Clause 41 would amend section 146. Section 146 would retain the definition of a 'close family member' but exclude disclosing to a close family member as a defence. The retention of the definition would appear to be superfluous.

Clause 46 would add a new section 155B. Sub-section (2) would provide that '[t]he powers conferred by this Act on a police officer are in addition to, and do not limit, any other power the police officer may have under another law of Territory.'

It is not clear what powers would be conferred on a police officer under the ICAC Act.

Clause 47 would amend section 158 by introducing sub-section (6). Consideration should be given to the use of the term 'Police Force', and whether it would be more appropriate to refer to a 'law enforcement agency', as that term is defined in the ICAC Act.

I trust this submission is of assistance.

Yours sincerely

Michael Riches
Independent Commissioner Against Corruption

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[3] Section 145(3)(d)