Speaker

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# General Report

Section 48 - *Independent Commissioner Against Corruption Act 2017*

**ORIGINAL PAPER**

**No.** 1097

*Laid on the Table*

12 / 03 / 2024

Office of the Independent Commissioner Against Corruption NT

# Letter of Transmittal

The Honourable Dheran Young MLA
Speaker
Legislative Assembly of the Northern Territory

Dear Speaker

I submit a report prepared 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 that 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**

11 March 2024

# Contents

# Introduction

In November 2023, a number of amendments were made to the *Independent Commissioner Against Corruption Act 2017* (ICAC Act). The matters that can be addressed in a General Report of this kind has been expanded and I am pleased that that amendment has been made.

The purpose of this report is to provide an update on the activities of my office and to draw attention to some matters that I consider warrant further debate. As is my practice, I will not express a view on matters of policy. I merely identify issues about which further policy consideration might be beneficial.

This report is structured by reference to the various matters listed in section 48 of the ICAC Act.

# General Update (section 48(1)(f))

The ICAC Act invests in me a wide range of statutory functions. In November 2023, the ICAC Act was amended to add an additional statutory function: gathering intelligence about improper conduct.[1] I will set out all of my functions later in this report.

We have attempted to structure our resources to give effect to all of those statutory functions. I am firmly of the view that efforts to prevent improper conduct are as important as efforts to investigate conduct that has already occurred.

## Evaluations and Reviews

In 2023, I completed a review of the practices, policies and procedures of the Department of Infrastructure, Planning and Logistics (DIPL), focusing on procurements in the Katherine office. I provided my report to the Chief Executive of that Department in October 2023. I made 18 recommendations to better address risks of improper conduct.

I want to acknowledge publicly that Department's support of my review.

I had intended to prepare a General Report to the Legislative Assembly about the review. However, to their credit, DIPL decided to publish my report in full on its website.[2] I was very pleased to see DIPL take that proactive step. It demonstrates a commitment to transparency and accountability.

Another review, led by Assistant Commissioner Loudon of my office, will be completed by 30 June 2024. That review is focussed on recruitment practices in a large government department.

[1] Section 18(1)(c)(vi).
[2] https://dipl.nt.gov.au/__data/assets/pdf_file/0009/1297854/review-of-practices-policies-and-procedures-.pdf

## Investigations

This financial year we have commenced 9 investigations and completed 10 investigations. We currently have 15 active investigations. Some of those investigations are in the procedural fairness stage, wherein persons against whom adverse findings might be made are given an opportunity to be heard on those findings. That process can take a long time, particularly where further evidence is adduced or inconsistencies are identified which require further investigative steps.

In the last 12 months I have completed 4 formal investigation reports in accordance with section 50 of the ICAC Act. I have made findings of corrupt conduct in one case, and unsatisfactory conduct in another. I have made a number of recommendations, the implementation of which I will monitor.

I have not published those investigation reports for various reasons. In one case, the nature of the conduct was so unique that the likelihood of repetition was extremely low. For that reason, and because of matters personal to the individual, I did not publish the report. In another case I was not persuaded that it was in the public interest that the conduct, amounting to nothing more than unsatisfactory conduct, warranted publication. In the other matters, no adverse findings were made and the reports were prepared to recommend improvements to processes that were identified during the investigation.

Several of our investigations have been referred to other agencies for further action.

Before 30 June 2024 we hope to complete another 4 formal investigation reports. Later in this report I will address some of the legislative challenges to the publication of investigation reports.

I have previously indicated that a second investigation report relating to the arrest of former Constable Zachary Rolfe would not be finalised until the conclusion of the current Coronial Inquest into the death of Kumanjayi Walker. While that inquest has taken longer than I first anticipated, I am not presently minded to depart from that course.

Some of my investigations have progressed at a glacial pace and I regret the time it has taken to bring those matters to a conclusion. It is not lost on me the personal impact of ongoing investigations and the public interest in their speedy resolution. They will progress at the speed at which my resources, my own capacity and fairness will allow.

In addition to our own investigation outcomes, where criminal conduct is identified that is brought to the attention of the Northern Territory Police. So far this financial year we have done so on 6 occasions. In most cases the Northern Territory Police is better placed to address alleged criminal conduct. That is so because it has the necessary resources, prosecutorial adjudication process and existing procedures with the Director of Public Prosecutions (DPP).

## Recommendations

Section 56 of the ICAC Act provides that I can make recommendations to a public officer or public body directed towards preventing, detecting, investigating, prosecuting or otherwise dealing with improper conduct.

Since I commenced as Commissioner I have made in excess of 60 recommendations in accordance with section 56. I briefly summarise the general nature of those recommendations.

**Training**

I have made recommendations for improvements in training offered to public officers. Specific training recommendations include:

- educating non-lawyers about appearances before tribunals
- maintaining integrity in tender processes
- addressing conflicts of interest in procurement and recruitment.

**Audits**

I have made recommendations to various public bodies to conduct audits, including in respect of:

- use of public money by grant recipients
- adherence to delegations
- verifying compliance with mandatory training
- asset registers
- contract variations and extensions
- adherence to the Commissioner for Public Employment determinations providing for the payment of allowances to public officers.

**Content of and adherence to policy**

I have made numerous recommendations calling for improvements to the content of policies and procedures, and adherence to those documents, including:

- ensuring consistency in guidance relating to the identification, disclosure and management of conflicts of interest.
- creating essential policies that don't exist within the public body, such as managing conflicts of interest or receiving gifts and benefits
- conducting wholesale reviews of policies and procedures to ensure they are consistent with contemporary practices and expectations.

**Practice improvement**

I have made recommendations relating to improvements in practice, including in relation to:

- record keeping, particularly in respect of conflicts of interest, procurement and recruitment
- engagement of third party suppliers to support recruitment activities
- risks assessments related to machinery of government changes.

To the best of my knowledge, all of the recommendations I have made have been accepted, either in whole or in part.

Section 57 of the ICAC Act permits me to monitor the implementation of recommendations I have made. Through our newly established Strategic Intelligence and Review Team, we are actively monitoring the implementation of the vast majority of recommendations made.

## Prevention and Engagement

Our prevention and engagement activities are extensive. Since this office commenced, we have seen a 237% increase in the delivery of prevention and education activities, and a 689% increase in attendance at such activities.

We are moving towards the delivery of online training, including through video training courses, in order to maximise our reach. Our conflict of interest course, and whistleblowers videos in particular, have reached a broad audience.

We are also working to improve our regional and remote outreach. While we are already regular visitors to Alice Springs, and have visited Tennant Creek and Katherine on a number of occasions, over the next 6 months we will also visit:

- Jabiru
- Gunbalanya
- Tiwi Islands
- Ali Curung
- Mutitjulu
- Groote Eylandt
- Numbulwar
- Maningrida
- Ramingining
- Ngukurr

In light of the impending NT General Election over the coming months we will publish a video explaining anti-democratic conduct, which is a form of improper conduct under the ICAC Act.

## Strategic Intelligence and Review

As I have said, in November 2023 the ICAC Act was amended to add a further statutory function related to the collection of intelligence. I welcome that additional function.

We have established a small team who will focus on gathering intelligence, conducting reviews and monitoring the implementation of recommendations.

## Protecting whistleblowers

In March 2023, I commenced a project to review whistleblowing in the Northern Territory. As a part of that project, we held a phone-in evening, resulting in 29 calls. We also received numerous written submissions. We consulted with a number of public bodies about their whistleblowing policies.

Two things emerged from that project. There is a strong sense of concern about coming forward to report wrongdoing. The fear of personal repercussion is a barrier to many individuals calling out improper conduct. So too is the perception that there is little point in reporting concerns. Those observations are echoed by results in the 2023 People Matter Survey[3]:

- only 49% of respondents agreed that it was safe to speak up and challenge the way things are done in their organisation
- while 79% of respondents agreed that they would be confident to approach their manager to speak about concerns or grievances, only 45% agreed that their manager would appropriately deal with employees who performed poorly.
- only 58% of respondents agreed that they would be protected from reprisals for reporting improper conduct, while only 52% agreed that reports made in their organisation would be investigated in a thorough and objective way.

We made a number of submissions in respect of changes to whistleblower protections in the ICAC Act. In November 2023 numerous changes to those protections were enacted. That is pleasing.

Those changes are quite substantial, and require significant effort to ensure public officers across the Northern Territory are aware of, and act consistently with, the statutory scheme.

We have since published a video setting out the whistleblowing scheme. In January 2024, we published two comprehensive documents:

- *Directions and guidelines for dealing with voluntary protected communications*
- *Guidelines for the minimisation of retaliation against protected persons.*

Those documents were made based upon what we had learned during the whistleblower review project. Collectively, those documents set out 14 directions and 22 guidelines.

Section 110 of the ICAC Act provides that I may evaluate or review a public body's adherence to those directions and guidelines. I have placed public bodies on notice that I will begin such evaluations in August 2024.

[3] https://ocpe.nt.gov.au/__data/assets/pdf_file/0008/1260881/northern-territory-public-sector.pdf

## Australian Public Sector Anti-Corruption Conference 2024

I am particularly pleased that we will host the next Australian Public Sector Anti-Corruption Conference (APSACC). The APSACC is the premier anti-corruption conference in Australasia and this is the first time the conference will be held outside of the eastern seaboard.

The conference, which will take place between 29-31 July 2024 at the Darwin Convention Centre, has already attracted speakers and participants from around the world, including from the United Kingdom, Zambia, Pakistan, New Zealand, Fiji, Vanuatu and Papua New Guinea, as well as nationally.

In a significant development, we have recently confirmed the attendance of Baroness Casey of Blackstock. In 2023 Baroness Casey, who is a member of the House of Lords of the United Kingdom, delivered her landmark report into behavioural standards and culture in the Metropolitan Police in London, and will travel to Darwin to speak about her work.

Other keynote speakers include the Honourable Paul Brereton AM RFD SC, the Commissioner of the National Anti-Corruption Commission, and Professor Paul Heywood of the University of Nottingham, a world leading researcher into corruption and integrity.

I do hope public officers in the Northern Territory will take advantage of the opportunity to hear from world leading experts in our own backyard.

## Organisation management and output

In addition to the statutory functions given to me under the ICAC Act, I am also the Chief Executive Officer of my office. I have the same organisational responsibilities as other Chief Executives, in addition to the statutory functions given to me.

We are subject to numerous audits each year, and we must ensure we lead the way in terms of our financial management, governance, work health and safety, recruitment, procurement and risk management.

As I hope this General Report will demonstrate, our output is remarkable given our size, the resources available to us and our breadth of responsibilities.

That has little to do with me, and much to do with the individuals I have the privilege of working with each and every day.

# Relevant matters in other jurisdictions (section 48(1)(h))

## Findings of the United Nations Human Rights Committee – NSW ICAC

Late last year my attention was drawn to a determination made by the United Nations Human Rights Committee (UNHRC), in respect of an investigation and findings of the New South Wales Independent Commission Against Corruption (NSW ICAC).[4]

I thought it would be prudent to provide an explanation of that determination and the extent to which statutory provisions in the Northern Territory are analogous to those considered by the UNHRC. It is not a matter for me to express a view about the correctness of the process adopted by the NSW ICAC, nor the UNHRC's analysis. No doubt the New South Wales Government or the Australian Government will address those matters.

## Background

Australia is a signatory to the International Covenant on Civil and Political Rights (the Covenant).[5] It is also a signatory to a document referred to as the Optional Protocol to the Covenant (the Protocol).[6] Signatories to the Optional Protocol agree that the UNHRC can receive, and determine, assertions made by individuals of violations of the Covenant.

## NSW ICAC Investigation

During 2010-2011, the NSW ICAC conducted an investigation into alleged failures to disclose conflicts of interest associated with the Sydney Harbour Foreshore Authority. In late 2011, the NSW ICAC published an investigation report, which included adverse findings against a person named Charif Kazal.

In short, those findings were that Mr Kazal had engaged in conduct that would amount to two criminal offences, namely:

1) giving false or misleading evidence at an ICAC examination and

2) giving corrupt commissions or rewards.

While those findings were made upon a consideration of the evidence and the elements of the above-mentioned offences, they were made on the balance of probabilities and were administrative, rather than judicial, findings. They did not constitute a finding that Mr Kazal was guilty of those offences. Such a finding is exclusively a matter for a properly constituted court.

Mr Kazal sought judicial review of those findings in the New South Wales Supreme Court but was unsuccessful.

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[4] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F138%2FD%2F3088%2F2017&Lang=en

[5] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

[6] https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-international-covenant-civil-and-political

## The Complaint

In 2017, Mr Kazal made a complaint to the UNHRC. He alleged that the findings of the New South Wales ICAC violated articles 14 and 17 of the Covenant.

Article 14(2) of the Covenant states that:

> *'In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'*

Mr Kazal argued that because the NSW ICAC conducted hearings publicly, and made and published findings against him by reference to criminal offences, his right to the presumption of innocence has been severely compromised. While Mr Kazal conceded that the findings did not have criminal consequences, 'such findings retain the unique stigma of a criminal finding to the private lives of investigated persons.' He argued that such circumstances violated article 14(2).

Article 14(5) of the Covenant provides that any person convicted of a crime should have the ability to test that conviction in a higher court.

Mr Kazal argued that because there was no right to appeal the findings of the NSW ICAC, such an absence of appeal rights was a violation of Article 14(5).

Article 17 of the Covenant provides that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation' and that '[e]veryone has a right to the protection of the law against such interference or attacks'.

Mr Kazal argued that the public hearings held by the ICAC and the findings that his conduct could constitute a criminal offence violated Article 17.

## The UNHRC Ruling

Having considered Mr Kazal's complaint and responses put forward on behalf of Australia as a party to the Covenant, the UNHCR ruled as follows.

As to the claims underpinned by Article 14, because Mr Kazal was not the subject of criminal charges, the asserted violations of that Article could not arise. Therefore those claims were deemed inadmissible and not further considered.

As to claims underpinned by Article 17, the Committee (by majority) determined that:

> *In the present case the Committee finds that the decision by the ICAC to hold a public hearing and make public findings in which the ICAC concluded that the author had sought to improperly influence the impartial exercise of the official functions of a public officer, but where said findings could not be challenged by the author before any domestic authority and for which the ICAC provided no reasoning as to its decision to make the proceedings and findings public, amounted to an arbitrary interference in the author's right to privacy. The Committee finds that the decision to make the proceedings public, without providing the author with adequate procedural safeguards, cannot be found to be proportionate and necessary to the objective pursued in the particular circumstances of the case, especially taking into account the author's claim that the publication of the findings damaged his reputation and his ability to conduct his family business.*

…

*The Committee therefore concludes that the inquiry conducted by the ICAC, and its adverse public findings made against the author which he could not challenge, amounted to a violation of the author's rights under article 17 of the Covenant.*

The Committee ordered the State Party (being the Commonwealth of Australia) to pay compensation and reparation to Mr Kazal, and to 'take all steps necessary to prevent similar violations from occurring in the future.'

As I have indicated, I am not privy to the position taken by the Commonwealth in respect of the ruling and it would be inappropriate for me to opine on that issue.

## Relevance to the Northern Territory

In the Northern Territory, I am empowered to make findings of improper conduct against individuals and entities. In so far as corrupt conduct, misconduct and anti-democratic conduct is concerned, those findings can be made on the basis that a person has engaged in conduct that satisfies the elements of a criminal offence (albeit only in circumstances where the conduct is 'connected to public affairs'). Indeed, a finding of anti-democratic conduct can only be made upon being satisfied that a person has engaged in conduct of a kind that would satisfy the elements of an offence under the *Electoral Act 2004* or certain parts of Local Government legislation.

Of course, my findings are administrative in nature. I am not a judge and I do not exercise judicial power. I am not empowered to impose a sanction or penalty and my findings are based upon the civil standard of proof (taking into account certain common law principles), rather than the higher criminal standard. While I am not bound by the rules of evidence, my findings are not to be based upon 'inexact proofs, indefinite testimony or indirect inferences'[7].

As is the case in New South Wales, there is no mechanism to seek a merits review of my findings. Parties can challenge the process I adopt by way of judicial review in the Supreme Court, but such review is limited.

## Merits review?

The desirability of a merits review process was considered in 2015 during a review into the NSW ICAC.[8] That review was conducted by the Hon. Murray Gleeson AC KC, former Chief Justice of the High Court of Australia, and Bruce McClintock SC, former Inspector of the NSW ICAC and current Inspector of the NT ICAC.

On the question of merits review, the authors said:

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[7] *Based upon a principle established in a High Court case called Briginshaw v Briginshaw* (1938) 60 CLR 336.

[8] https://www.oiicac.nsw.gov.au/assets/Uploads/Reports/Other-Reports/Independent-Panel-Review-of-the-jurisdiction-of-ICAC-2015-Report.pdf

*What is not available as a ground of review is the most common ground in appeals from a court: that the decision was wrong because it was affected by a mistake of fact. In brief, there is no merits review of an ICAC finding.*

*3.4.4 The reason no merits review is available is the administrative nature of the process. What is involved is not a judicial decision;; it is an investigator's report of his or her findings and opinions at the conclusion of the investigation.*

*3.4.5 To make merits review available in respect of ICAC reports would require either a substantial alteration to the character of the Supreme Court's jurisdiction under the Supreme Court Act, which, in turn, would have consequences in respect of other administrative bodies, or the creation of a new form of internal or external review.*

*3.4.6 The New South Wales Bar Association made a submission to the Panel which recognised the problem referred to in paragraphs 3.4.4 and 3.4.5. It argued that an appropriate form of review would be one analogous to that undertaken by the Federal Court of Australia under the Administrative Decisions (Judicial Review) Act 1977 (Cth), with any counterpart of section 5(1)(h) framed in more expansive language such as: "the decision was not reasonably supported by the evidence or other material before the Commission".*

*3.4.7 The ground in section 5(1)(h) is "that there was no evidence or other material to justify the making of the decision". That is not merits review. What is proposed seems more like an expanded form of what is sometimes called Wednesbury unreasonableness. It appears close to administrative oversight rather than judicial review.*

*3.4.8 In addition to the risk of confusion of judicial and administrative functions, the Panel considers that to provide for merits review would add to the problem of misunderstanding as to the ICAC's role. It would make it look even more like a court.*

*3.6.5 As noted earlier, the findings in a report are an investigator's statement of the results of his or her investigation, not a judgment about the merits of a dispute, or an adjudication of criminal guilt. They are not subject to merits review. They could be wrong. They may depend upon contestable conclusions about the evaluation of evidence and the credibility of witnesses. People are free to argue about, and criticise, the quality of the investigation, or the quality of the reasoning in the report, or, for that matter, the quality of the investigator. Some people are better placed than others to do that. This may be for a number of reasons including, but not limited to, resources.*

*3.6.6 The law is not so disconnected from reality as to treat an anti--corruption commission finding, after a public inquiry, that a person has engaged in corrupt conduct, as no different in its nature and effect from a police officer's report as to whether somebody was at fault in a traffic accident. This is why findings are amenable to judicial review, even though they cannot be set aside on the basis that they are simply wrong as a matter of fact.*

The authors concluded:

> *The question whether provision should be made in the Act, or in other legislation, such as the Supreme Court Act 1970, for general merits review of findings of corrupt conduct has been examined by the Panel. The Panel does not recommend this course, which would involve an inappropriate confusion of administrative and judicial powers.*

## Publication and damage to reputation

There is no question that my activities may have the effect of unfairly damaging a person's reputation. I am very much alive to that issue and I take a very cautious and careful approach to activities or findings that might have that effect.

There are other matters relevant to the publication of reports and public inquiries, which I will speak about later.

For now, I draw the UNHRC's draft decision to the Legislative Assembly's attention.

## Procurement risks – local content criteria (New South Wales)

The New South Wales Legislative Council Standing Committee on Social Issues is presently conducting an inquiry into 'procurement practices of government agencies in New South Wales and its impact on the social development of the people of New South Wales'.

In its submission to the Inquiry,[9] the New South Wales ICAC identified a number of integrity risks associated with procurement. Those integrity risks apply equally to the Northern Territory. Indeed, many of the risks are echoed in my review of DIPL, referred to earlier.

I draw particular attention to the observations of the NSW ICAC in respect of evaluation criteria targeted towards local content. I set out those observations:

> *For a variety of reasons, the Commission does not support selection criteria or weightings that give preference to local content or local suppliers. In particular, local content/supplier policies:*
> - *Potentially sacrifice value for money by limiting competition and may prevent access to new products and innovative solutions*
> - *Create unnecessary lobbying risks whereby parliamentarians or councilors are approached to support their local businesses*
> - *Struggle to adequately define the term 'local'. For example, a supplier could be classified as local based on the location of its registered headquarters, ultimate owner(s), workforce, main operating premises or where it pays the most tax. In addition, a judgement needs to be made about exactly how close a supplier needs to be to its government customer in order to be regarded as 'local'.*
> - *Generally lack a suitable methodology for determining when and how to apply the degree of preference*
> - *Could be used to mask a conflict of interest between a local supplier and an agency decision-maker.*

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9 https://www.parliament.nsw.gov.au/lcdocs/submissions/83449/0018%20NSW%20Independent%20Commission%20Against%20Corruption.pdf

*These factors make the procurement process more subjective and cumbersome. They may also encourage suppliers to submit tendentious or false statements about the local nature of their business.*
*For many categories of goods and services, local suppliers already benefit from some natural advantages over their more remote competitors. For example, a local supplier may have lower transport costs and business overheads or may be more responsive to customer needs. Consequently, the Commission sees little benefit in policies that favour local content or suppliers.*[10]

As a general rule I do not think it appropriate for a statutory office holder to express opinions on matters of policy. I am not qualified to express an opinion about the economic or other benefits associated with buy local policies. No doubt there are many differences between Australian jurisdictions and to equate economic and market conditions in New South Wales with those in the Northern Territory would be unwise.

Nevertheless, some of the integrity risks, as identified in the NSW ICAC submission, not only exist in this jurisdiction but are amplified because of our small population. Risks associated with:

- improper favouritism towards particular individuals or suppliers (who may become well known, both professionally and personally, to decision makers)
- the capacity for local suppliers to lobby decision makers to create an uneven playing field, and
- the potential for 'buy local' targets to mask decisions that favour personal interests, rather than the public interest,

are matters that have been raised with me privately by some suppliers and have featured in reports to my office. Regrettably, although perhaps understandably, many suppliers who engage with my office do so anonymously, as they are concerned that their identification may further jeopardise future government contract opportunities.

It is in the public interest that all public procurement activities have in place appropriate safeguards to reduce the impact of improper and irrelevant influences coming to bear on procurement decisions.

For that reason I draw attention to the submission of the NSW ICAC.

# Matters that affect the performance of my functions (section 48(e))

## Access to Cabinet Documents

In July 2022, I provided a General Report to the Legislative Assembly, wherein I spoke of the legislative constraints to my ability to access Cabinet documents.[11] I set out the relevant provisions in that report so it is unnecessary to repeat it here. It is sufficient to say that I cannot compel production of Cabinet documents, nor does the ICAC Act authorise the provision of those documents to me. Of course, that does not prevent Cabinet from determining to provide me with

[10] Ibid, pages 11-12.

[11] https://icac.nt.gov.au/__data/assets/pdf_file/0009/1174365/ICAC-General-Report-July-2022_web.pdf

such documents where it considers that the public interest in disclosing those documents to me outweighs the public interest in retaining their confidentiality.

In my July 2022 report I set out two examples of occasions where I had sought Cabinet documents.

On the first occasion, documents were not provided. That meant that my investigation had to be closed.

On the second occasion, I was permitted to inspect Cabinet documents that had been provided to me by an anonymous source.

Since that time, I have sought Cabinet documents on a further 5 occasions. On four occasions, access was declined. The final matter arose only very recently and I am awaiting a response.

I emphasise that I do not criticise the Government's position. Parliament has determined that it is appropriate that there be a statutory barrier to my ability to access Cabinet documents, and the Government is perfectly entitled to rely upon that statutory barrier. Even absent that statutory barrier, it has long been established that documents recording the deliberations of Cabinet are of a kind that would ordinarily attract public interest immunity, although whether that immunity is upheld requires a process of balancing competing public interests.

As an investigator, I will naturally wish to have access to all relevant material. I appreciate that there are other considerations that must figure in Cabinet's consideration and it is not my role to suggest where the balance should lie.

However, where assertions are made, for example, of a failure by a Minister to address a conflict of interest in the context of a Cabinet decision, without access to relevant Cabinet documents I cannot ascertain whether that Minister (and/or Cabinet) took appropriate steps to manage that conflict. In short, there is little I can do to address those allegations and I will take no further action.

Similarly, where an assertion is made that information provided to Cabinet, and upon which Cabinet made a decision, was intentionally misleading, I cannot investigate that allegation because I do not have access to the critical evidence.

In other jurisdictions, rules vary. As an example, a ruling of Assistant Commissioner McColl of the New South Wales ICAC explores the process applied in respect of access to cabinet documents in New South Wales.[12]

In light of the effect that access to Cabinet documents has had, and will likely continue to have, on my capacity to investigate some allegations of serious improper conduct, I consider it in the public interest to raise this issue.

[12] https://www.icac.nsw.gov.au/ArticleDocuments/964/RULING%20regarding%20Cabinet%20documents%20and%20deliberations%2017%20October%202021%20FINAL.pdf.aspx

## Use of compelled evidence in reports

In my General Report to the Legislative Assembly in 2021, I raised concern about the statutory constraints that prevented me from including compelled evidence in public reports or statements.[13]

When I gave evidence before the Estimates Committee in 2023, I made the following observations in respect of the then Bill to amend the ICAC Act:

> *The primary issue, and one that should be further considered and debated, is the question of the use of compelled evidence in a public report or statement. Let me briefly explain what I mean.*
>
> *In recent times, I have conducted an investigation where I relied heavily upon evidence obtained from witnesses during an examination. Those witnesses were required to give evidence. As a consequence of that evidence—together with some other material but in large part because of the evidence that they gave—I made findings that an individual had engaged in corrupt conduct. However, as the Act is currently constructed, I am not permitted to put in any public statement the material that was obtained coercively. In other words, I was not permitted to include in the public statement the evidence that I obtained through those examinations.*
>
> *I took the view that it would be patently unfair on that individual to identify that individual but not be able to set out the evidence that I fundamentally relied upon. It would, in essence, be saying, 'I found that person X is engaged in corrupt conduct. Just trust me.' I do not think that is appropriate.*
>
> *However, the bill, as currently constructed, creates some challenges in that the way I read the provisions, if they are amended and enacted in the way that they have been. The effect would be that I could not include compelled evidence in a report that I make to parliament, but I could include it in a report made that I publish. That sets up a situation where if I make findings against a minister or an MLA, I cannot include the compelled evidence, but if it is in respect of someone else, I can. I am not going to express a view; however, one might think that is an odd consequence for what would become a two-tier system.*
>
> *I have raised those issues with, as the Chief Minister quite rightly said, a team that has been working very hard on the bill. I followed it up in respect of the written submission I have made.*
>
> *The question of whether compelled evidence ought to be included in any public report is an issue that is universally challenging. It is an issue that is raised in other jurisdictions. It is a particular issue in respect of the potential impact that might be occasioned on future criminal proceedings.*
>
> *The only point I would make is, to the best of my knowledge, I am the only jurisdiction in the country that has the power to make findings but does not have the power to include that evidence in any public report. If that does not change, my process will not change. I will probably not publish reports because if I cannot publish a fulsome report that has all the evidence in it, I have concerns about publishing a report at all. If I was to make a public statement, it would be of the kind that I have made in the past, which would ensure that a person is not identified on the face of the statement.*
>
> *A number of other practical considerations arise in respect of the bill, but to me that issue of the use of compelled evidence is the most critical. I express no view as to what the final outcome should be, but I encourage there to be good, solid debate on that question, because it is a very important question.*

[13] https://icac.nt.gov.au/__data/assets/pdf_file/0010/1174366/ICAC-General-Report-November-2021_web.pdf

In November 2023, the Bill to amend the ICAC Act passed and all amendments have now commenced.

It is prudent to explain the new scheme, in so far as this topic is concerned.

I am now permitted to publish an investigation report.[14] However, that power does not extend to an investigation report made to the Speaker or Deputy Speaker.

I am still not permitted to include compelled evidence in a published investigation report, or a report to the Speaker or Deputy Speaker.

I am permitted to include compelled evidence in an investigation report that is not published, nor provided to the Speaker or Deputy Speaker.

Where a report relates to the conduct of an MLA, including a Minister, I **must** provide that report to the Speaker (or Deputy Speaker if the report relates to the Speaker).[15] The report must then be tabled in Parliament.

Accordingly, I cannot ever refer to compelled evidence in a report relating to the conduct of an MLA, including a Minister, but I can refer to compelled evidence in a report about any other public officer, provided to I do not publish that report.

One might immediately see the disparity.

Of course, those constraints are displaced where I conduct a public inquiry as a part of my investigation, but only in so far as the compelled evidence is taken in public.

## Public Inquiries

The amendments made to the ICAC Act in November 2023 have addressed some of the concerns I had about the conduct of public hearings, particularly relating to security.

I am now in a position where I can give more serious consideration to the conduct of public inquiries.

In deciding whether to conduct a public inquiry, I will take into account the factors mentioned in clause 5 of Schedule 1 of the ICAC Act. They are:

*(a) The desirability of the public sector being open and accountable to the public;*

*(b) The benefit of exposing improper conduct to public scrutiny;*

*(c) The extent to which allegations of improper conduct are already in the public domain;*

*(d) The extent to which allegations of improper conduct raise issues of continuing public interest;*

*(e) The risk that a person may suffer undue hardship, including undue prejudice to the person's reputation;*

*(f) The needs of persons who have assisted in identifying or investigating improper conduct and particularly the need to protect information that may identify those persons;*

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[14] Section 50A(1).

[15] Sub-sections 50(1) and (7)

(g) *Any views expressed by persons who would be affected by a decision whether to handle a matter in private or public;*

(h) *The educational value and benefits to research and policy development of sharing details of matters about which the ICAC has particular knowledge.*

Before 30 June 2024, I will publish a guideline on the conduct of public inquiries. That document will include information about the public inquiry process, and will include particular information for witnesses, lawyers and the media.

I am very much aware of the attention drawn to the activities of anti-corruption commissions and the very real risk of unfair damage to the reputation of individuals who may be a part of those activities. That consideration will figure prominently in any determination as to whether to conduct a public inquiry and, if so, what evidence will be heard in public and what will be heard in private.

## Approach going forward

For now, where I make a finding that a person has engaged in improper conduct, and that finding is based, either in whole or in part, on evidence that I have obtained but that I cannot publish, it is unlikely that I will publish an investigation report. To do so would be unfair and would not represent a fulsome explanation as to how I have come to my findings. It may be that I decide to publish a public statement, but such a statement would of a general nature only.

Similarly, where I make an investigation report to the Speaker (or Deputy Speaker), as I am obliged to do where the investigation has addressed the conduct of an MLA, including a Minister, I will only make findings where those findings are founded on evidence that I am permitted to include in that report. I will not include findings that could only be made upon evidence that I am not permitted to include. To do otherwise would be unfair for the reasons I have already explained.

## Activities in the lead up to the General Election

History has shown that in the lead up to elections, anti-corruption agencies are sometimes used to score political points by the making of public statements that political opponents have been referred to that agency.

I respectfully ask that that not occur this year.

First and foremost, such public statements will have no affect whatsoever on how we assess such allegations and what, if any, action will be taken.

But most importantly, our legislation operates on the presumption that much of our work will take place in private. There is very good reason for that approach. The public announcement of such referrals can sometimes compromise our ability to take appropriate steps to inquire into them. For example, one can readily see that such publication, in a politically charged environment, may make witnesses less likely to come forward and assist in our inquiries.

I ask that, to the extent it can be achieved, my office be left out of such public commentary.

# Adequacy of Resources (section 48(e)(iv))

## Staffing

My resources continue to be a barrier. We are experiencing the challenges associated with skills shortages in the Northern Territory. Indeed, our target market is in short supply nationally, and is a common talking point amongst anti-corruption commissioners.

For reasons that should be apparent, my strong desire is to recruit investigators and lawyers whose background is from outside of the Northern Territory. That is in no way a criticism of the quality of candidates in this jurisdiction, but reflects the inherent difficulties in having lived in such a small jurisdiction for a long period of time. We take a very cautious approach to actual and perceived conflicts of interest, meaning that many of our meetings involve a veritable game of musical chairs as individuals absent themselves from discussions about certain matters. Given we are such a small office, associations and conflicts present some real difficulties in terms of the allocation of resources to various activities.

For that reason, we have focussed more upon recruitment from other jurisdictions, including from overseas.

In September 2023, we participated in a jobs expo in Auckland, New Zealand. That expo was organised and facilitated by Migration NT. While we had numerous individuals who expressed great interest, we have yet to translate that interest into employment.

In January 2024, the Acting Commissioner for Public Employment issued a determination that will allow me to pay an allowance to certain members of my staff. There are stringent conditions that apply to eligibility for the allowance, meaning that only a small number of my staff will be eligible. I first advocated for such an allowance in September 2022. While it is regrettable that it has taken 16 months to materialise, I am hopeful that the potential for additional remuneration will put me in a better position to attract suitable individuals to move to the Northern Territory and contribute to our important work.

We have commenced a recruitment campaign seeking to attract suitably skilled and experienced investigative lawyers from the United Kingdom. We have aligned this activity to coincide with the upcoming jobs expos to be facilitated by Migration NT in May 2024. While we will participate in some of the planned jobs expos, we have learnt from our experience in New Zealand and will conduct pre-emptive recruitment activities with a view to having candidates to interview while in the United Kingdom. I am hopeful that this approach, together with the potential for the payment of an allowance to suitable candidates, will put us in a better position to translate interest into employment.

## Budget

In my opinion my budget is not adequate, but I accept that the Northern Territory operates in a tight fiscal environment and there are a multitude of competing priorities against which finances are to be allocated.

Of course, when it comes to funding an independent integrity agency, two matters must be considered. The first is the sufficiency of the budget itself. The second is the process by which that funding is determined.

With that in mind, I make the following observations.

Parliament has seen fit to invest in me numerous statutory functions. Those statutory functions under Section 18(1)(a-e) are:

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

It is a long list. As I have said publicly in the past, I regard my prevention and education activities as equally important as my investigative functions.

I value my independence and will guard it fiercely. But my capacity to act independently is contingent upon having the resources that allow me to carry out functions as I consider appropriate. Regrettably there have been several instances where my desire to investigate a matter has been thwarted by the reality that I do not have the resources to do so. Similarly, some of my investigations have taken far too long to complete, owing to the need to juggle multiple priorities within a small team. Some education and prevention activities have either not taken place, or have been significantly delayed, because of resource constraints.

What amounts to sufficient resources is difficult to answer, but ought to be the subject of further debate. However, such debate ought to be well informed. It is frustrating to hear public commentary that is uninformed. By way of example, I am aware of one instance where a direct comparison was made between my office and the South Australian Independent Commission Against Corruption (SA ICAC). Such a comparison fails to recognise that the breadth of functions invested in me are actually divided between four separate agencies in South Australia. Even then I have functions that are not replicated at all in that jurisdiction. Care must be taken when attempting to make such comparisons.

I am aware that I may seek additional funding for discrete activities. However, I have resisted invitations to seek Treasurer's advances to supplement my baseline budget. I have a principled objection to that approach. I do not think an independent statutory office holder should have to go cap in hand to Treasury seeking additional funds to be able to carry out their statutory functions.

The nexus between independence and resources has been the subject of consideration elsewhere.

In 2020 the Auditor-General of New South Wales published a special report entitled: *The effectiveness of the financial arrangements and management practices of four integrity agencies*.[16] That report considered funding arrangements for the New South Wales ICAC, the New South Wales Ombudsman, the New South Wales Law Enforcement Conduct Commission and the New South Wales Electoral Commission.

The author made a number of observations. On the question of seeking additional funding during the financial year, the Auditor-General wrote:

> *If the integrity agencies require additional funding during the year, the only mechanism available is to seek funding from [the New South Wales Department of the Premier and Cabinet – the Department]. This creates a potential threat to their independence. Asking [the Department] to make decisions about funding allocations between an integrity agency and another agency in [the Department's] cluster is inappropriate because the integrity agencies are not accountable to [the Department] and [the Department] is not responsible for the functions or actions of the integrity agencies. In addition, it is possible that [the Department] could be the subject of an investigation conducted by an integrity agency. There are no criteria or guidelines for integrity agencies seeking additional funding from [the Department]. This means there is very little transparency to Parliament about the requests made and the reasons that they were granted.*[17]

**Parliament's role**

On the question of Parliament's role in integrity agency budgets, the NSW Auditor-General noted:

> *In several comparable jurisdictions, parliamentary committees provide advice on the budgets for integrity agencies. In some of these jurisdictions, the heads of integrity agencies are formally classified as Officers of Parliament to signify a more direct relationship with Parliament. The use of these mechanisms in other jurisdictions is intended to provide a clearer distinction between integrity agencies and other government departments and agencies. This aims to provide additional safeguards to the independence of integrity agencies, while also improving the transparency of the decision-making for integrity agency budgets and improving the transparency of integrity agency performance to Parliament and the public.*

The author concluded:

> *The current approach to determining annual funding for the integrity agencies presents threats to their independent status. The approach is consistent with the legislative and Constitutional framework for financial management in New South Wales, but it does not sufficiently recognise that the roles and functions of the integrity agencies that are the focus of this audit are different to other departments and agencies.*
>
> …
>
> *The government of the day is responsible to the citizens of New South Wales for the prudent and responsible management of the state's finances. Accordingly, the government of the day*

[16] https://www.audit.nsw.gov.au/our-work/reports/the-effectiveness-of-the-financial-arrangements-and-management-practices-in-four-integrity-agencies

[17] Page 6.

> *has a central role in decisions about funding for departments and agencies and in determining the financial management processes to be applied. This is clearly established in the legislative framework and conventions for managing public funds in New South Wales. This system is primarily designed to determine the funding for departments and agencies that are responsible to ministers. It is less appropriate for integrity agencies because it does not provide additional protection against the risk that funding decisions could be influenced by previous or planned investigations by the integrity agencies. This risk has the potential to limit the ability of the integrity agencies to fulfil their legislative mandate.*

In its report entitled 'Budget process for independent oversight bodies and the Parliament of New South Wales',[18] the Public Accountability Committee of the New South Wales Legislative Council observed that:

> *In its first report the committee acknowledged that the annual appropriations process reflects the principle that the government is responsible for the financial management of the state. However, the committee found that the way in which that principle is currently applied conflicts with the fact that the independent oversight bodies are responsible to Parliament, not the government, and require independence from the government to carry out their functions. The committee also found that the current process has led to instances of underfunding of these bodies.*

In his report on a 'Review of culture and accountability in the Queensland public sector',[19] Professor Peter Coldrake AO recommended that:

> *[t]he independence of integrity bodies in Queensland be enhanced by aligning responsibility for financial arrangements and management practices with the Speaker of Parliament and the appropriate parliamentary committee, rather than the executive.*[20]

In Victoria, changes to legislation in 2019 now requires the Independent Broad-based Anti-Corruption Commission (IBAC) to prepare a draft budget in consultation with its Parliamentary oversight committee. However, as I understand it, the legislative intention is unable to be realised because budget decisions still rest with Cabinet and, accordingly, are subject to Cabinet in Confidence disclosure constraints.

In 2022 the then Commissioner of the IBAC, together with the Victorian Ombudsman and the Victorian Auditor-General, published a joint paper calling for further transparency in funding decisions.[21] In short, they called for Parliament to have a more active role in determining the budget of independent integrity agencies, or the involvement of an independent body akin to a remuneration tribunal.

As I understand it, in New Zealand the Parliament determines the budget available independent entities. A parliamentary committee, chaired by the Speaker, considers budget proposals from independent entities. That process takes place through a public and transparent process. While the

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[18] https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2558#tab-reportsandgovernmentresponses
[19] https://www.coaldrakereview.qld.gov.au/assets/custom/docs/coaldrake-review-final-report-28-june-2022.pdf?refresh
[20] Page 71
[21] https://www.ibac.vic.gov.au/media/243/download

treasury has an opportunity to make a submission on any budget proposal, it is the Parliamentary committee that recommends the budget to Parliament, and Parliament that makes the decision.

At present, I must make a budget submission for consideration by Cabinet. Because that submission is a Cabinet document, I am not permitted to share it. That submission is considered by Cabinet. I am not privy to that process. My understanding is that my submission is considered in the same way as other budget submissions are considered.

While I make no assertions that this has or is occurring, one can readily see the difficulty where those who preside over my budget know that they are also the subject of my inquiry.

In my opinion, there is merit in giving fresh consideration to the approach taken to the determination of independent integrity agency budgets. Of course, such consideration would not only relate to my office, but also (at the least) the Ombudsman and the Auditor-General.

## Intentional or unintentional obstruction of the ICAC (section 48(e)(i)

### Entities receiving funding from multiple sources

On more than one occasion I have had to discontinue an investigation because I could not untangle the use of funding derived from the Northern Territory Government and funding from elsewhere.

Many entities that operate in the Northern Territory receive funding from a number sources, including the Northern Territory Government. It is not uncommon for entities to receive funding from the Northern Territory Government, the Commonwealth and private sources.

A body that receives Northern Territory public resources is a public body under the ICAC Act. However, where an allegation is made of misuse of resources, I am only empowered to consider that allegation against Northern Territory public resources. I cannot, for example consider alleged misuse of resources that were derived from the Commonwealth government.

I have encountered occasions where, despite obligations to do so, entities have failed to properly record and track expenditure against different income streams. Accordingly, it is sometimes difficult, if not impossible, to ascertain whether an alleged misuse of resources equates to a misuse of public resources, as defined in the ICAC Act. In such circumstances continued investigation is of little utility.

I do not readily have a solution to that issue, but I think further discussion is warranted.

# Identification of integrity risks (section 48(1)(g))

## Review of Ministerial conflicts of interest

I have repeatedly raised the integrity risks inherent in the failure to identify, disclose and manage conflicts of interest.

I welcome and support the review into ministerial conflicts of interest as announced by the Chief Minister. I have met with the review team and have undertaken to make a written submission. In keeping with my independence, I will publish that submission.

## Reporting of matters by prescribed public officers

Early in 2022, I amended the mandatory reporting directions issued by my predecessor under section 22 of the ICAC Act. Previously all public officers were required to report all instances of suspected corrupt conduct, misconduct, unsatisfactory conduct and anti-democratic conduct.

Since 2022 those reporting responsibilities have been reduced. Only certain public officers, known as prescribed public officers, are obliged to report to me suspected misconduct or unsatisfactory conduct.

Given those changes it is no surprise that the number of reports to my office has declined.[22] But I am pleased that the overall percentage of reports coming from public officers has increased. That suggests to me that our awareness activities has had an impact.

However, I am very confident that prescribed public officers, which include heads of public bodies, are not complying with their reporting obligations. I make that statement because I am aware, from other sources, that matters of serious misconduct have been addressed by public bodies, sometimes involving the termination of employment of a public officer, without the matter having been reported to me.

It is essential that I receive reports of improper conduct as required by the reporting directions. Without those reports, I cannot carry out my strategic intelligence function. Moreover, what might be considered misconduct or unsatisfactory conduct by a public officer may be assessed by my office as corrupt conduct, given our access to other information.

To that end, I respectfully remind prescribed public officers of the need to comply with their reporting obligations.

[22] See ICAC Annual Reports for statistics.

**Contact the ICAC**

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