

Preliminary Report pursuant to Section 140(3) ICAC Act 2017 - Inspector of the Independent Commissioner against Corruption

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1. The Administrator appointed me as Inspector of the Office of the Independent Commissioner against Corruption (OICAC or Office of the ICAC) Northern Territory on 28 September 2018. I am also the Inspector of the New South Wales Independent Commission against Corruption having been appointed to that office on 1 July 2017.
2. My appointment is for a term of five (5) years pursuant to section 134 of the *Independent Commission against Corruption Act 2017* (ICAC Act). Section 134 (5) provides, in effect, that no person can serve as Inspector longer than five years. Consequently, I will cease my role as Inspector no later than 27 September 2023.
3. The Administrator made a Determination of Conditions of Inspector at an Executive Council Meeting on 29 November 2018.
4. I am required by section 136 of the ICAC Act to evaluate the performance of the ICAC for a financial year and required by section 137 to provide the report to the ICAC Minister, (the Chief Minister) within three months after the end of the financial year to which the report relates.
5. As there has not yet been a financial year since the establishment of the ICAC, there is no statutory obligation on me to prepare a report. Nevertheless, I thought it inappropriate to wait until September 2022 to inform the Chief Minister and the Legislative Assembly of the matters the subject of this Report. This is the reason why this Report is titled Preliminary Report rather than Report on Evaluation of ICAC Performance. Statutory power to make such a report is provided by section 140(3) of the ICAC Act.

FUNCTIONS AND DUTIES OF INSPECTOR - STATUTORY FRAMEWORK

6. Section 135 of the Act specifies the following as functions of the Inspector:
- a. to evaluate the performance of the ICAC and report on the evaluation;
 - b. to receive and deal with complaints about the ICAC or members of ICAC staff
 - c. to make recommendations to the ICAC or public bodies regarding practices or procedures in relation to performance of functions under the Act
 - d. to perform other functions conferred on the Inspector under the ICAC Act.

No additional functions have been conferred on me under the ICAC or any other Act.

7. As stated above, section 136 requires the Inspector to evaluate the performance of the ICAC. In doing so, the inspector must consider:
- a. whether the ICAC and members of ICAC staff acted within power and in compliance with the Act and any other Acts or subordinate legislation;
 - b. whether the ICAC has implemented any previous recommendations made by the Inspector;
 - c. any other matters the Inspector considers relevant.
8. Section 137 requires the Inspector to give a copy of the proposed report on evaluation to the ICAC and to afford a reasonable opportunity to comment on the proposed report and to include a fair representation of the ICAC's comments in the report. Section 137(3) & (4) require the Inspector to provide the report to the Chief Minister within three months of the financial year to which it relates and the Chief Minister is required to table this in the Legislative Assembly within six sitting days.
9. Section 138 deals with complaints about the ICAC, the ICAC's office and ICAC staff members. It permits any person to complain about such people to the ICAC itself or to the Inspector.

If the complaint is to the ICAC, the ICAC must notify me as Inspector within 14 days. I am empowered (section 138(3)) to deal with a complaint in any manner I consider appropriate.

10. Under section 139, the Inspector is entitled to full and free access to the ICAC premises and all items in the possession and control of the ICAC for an evaluation under section 136 and dealing with a complaint under section 138.
11. Section 140 provides the Inspector with further powers but it is unnecessary to set them out here. Section 142 deals with staff of the Inspector and, in effect, enables staff of an existing agency to be allocated to me as Inspector.
12. One further statutory matter should be mentioned. In August 2019 the Legislative Assembly passed the Bill which has now become the *Integrity and Accountability Legislation Amendment Act 2019*. Section 18 of that Act amends section 134 of the ICAC Act to insert, after section 134(1), the following provision:

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

I fully support this amendment (which did not apply to my appointment). The Territory Legislature to which, through the Chief Minister, the Inspector ultimately reports should be involved in his or her appointment as such.

MY BACKGROUND

13. So the Chief Minister and the Legislative Assembly understand my background and experience, I have been a practising barrister since 1983 based principally in Sydney. My experience relevant to my role as Inspector is that I prepared for the New South Wales Government a Report into the ICAC legislation of that State in 2005 and in 2015, with the Honourable AM Gleeson AC QC, former Chief Justice of Australia, prepared a report into the further issues regarding that legislation.

14. As stated above, I was appointed Inspector of the New South Wales ICAC from 1 July 2017 and have performed that role since. Like the Northern Territory Inspector's appointment, it is a part-time position.

ESTABLISHMENT OF NORTHERN TERRITORY INSPECTORATE

15. I visited Darwin from 23-26 September 2018, to undertake preliminary discussions with the responsible officers of the Department of the Chief Minister (DCM) and with Mr Kenneth Fleming QC whose appointment as Commissioner had by then been announced.
16. Key outcomes of the meeting with DCM officers were:
- a. arrangements for creation of a website, which has been operative since late 2018. The address is <https://oiicac.nt.gov.au>. That website describes the nature of the office, the procedure for complaints, how the Inspector is accountable and contact details;
 - b. establishment of methods of contact. These are principally for receiving complaints and liaising with DCM. The email addresses are: Bruce.Mcclintock@oiicac.nt.gov.au; inspector@oiicac.nt.gov.au; Admin@oiicac.nt.gov.au. The second address is the one specified on the website for receiving complaints;
 - c. creation of a secure and independent records management system;
 - d. enabling remote access to my websites;
 - e. the provision of dedicated administrative resources to manage the website and monitor my email traffic. Ms Maria Mohr undertook responsibility for my office assisted by Ms Mel Griffith.
17. One further matter dealt with was responsibility for funding my office and remuneration. That is now the responsibility of DCM. It would have been inappropriate for my office to be an expense of the ICAC (which had been proposed) because of the nature of the relationship between the Inspector and the ICAC established by the legislation.
18. I have since visited the Northern Territory on three occasions, 2-6 December 2018, 24-27 February 2019 and 19-23 August 2019. Each visit has been for the purpose of advancing the establishment of the Inspector's office and liaising with the ICAC.
19. During the December 2018 visit I had the privilege of being the keynote speaker on a Northern Territory Government Human Resources Forum on Integrity in the Public Service. Interest in integrity issues and the newly created Office of the ICAC was extremely high from

the Territory public servants present and showed in the lengthy question and answer session that followed my presentation.

20. The purpose of the August 2019 visit was to carry out the evaluation of the ICAC's performance and prepare this report. I have had lengthy meetings with the Commissioner himself, Mr Matthew Grant the General Manager of the office of the ICAC and Ms Kelly Bennett who is acting chief investigator of the ICAC.

ADMINISTRATIVE MATTERS

21. Administrative support is being provided to me in my capacity as Inspector by officers of DCM, specifically, by Ms Maria Mohr, Deputy Chief Executive Officer and by Ms Mel Griffith, Ms Mohr's Executive Assistant. They manage document retention on my behalf and, to that end, have executed Confidentiality Agreements with me. I am grateful to them and acknowledge the very great assistance and help they have given. I also wish to acknowledge the assistance I received earlier from other Territory public servants in establishing the Office of the Inspector. I have particularly in mind Keith Fernandez, Giovina D'Alessandro, Bill Whittington, Kate Brennan and Arabella Ward. All those I have mentioned are a credit to the Territory public service and their help has been invaluable.

RELATIONS WITH THE OFFICE OF THE ICAC

22. While the Office of the Inspector is independent of the ICAC and is bound to exercise a significant oversight role in relation to the Office of the ICAC under the Act, I know from previous experience that performance of the Inspector's functions is significantly enhanced by a cordial and cooperative working relationship between the Commissioner and the Office of the ICAC on the one hand and the Inspector on the other. I am pleased to report that such a relationship exists (in my perception) between myself and Mr Fleming QC and the ICAC staff with whom I have dealt.
23. Relations between myself and the Office of the ICAC have been formalised by a Memorandum of Understanding (MOU) executed by the Commissioner and myself in April

2019. I have attached a copy of the MOU to this report for the information of the Chief Minister and the Legislative Assembly.

24. Pursuant to the MOU (and section 138 of the ICAC Act), the Commissioner has disclosed a significant legacy issue to me. This issue which was immediate and a pressing issue has been resolved, and it is not now impeding progress of the Office of the ICAC.
25. I have been informed that the Office of the ICAC is continuing an investigation of this matter. Because of the continuing investigation, it would be inappropriate to discuss it further in this Report.
26. I am satisfied that the Commissioner and the Office of the ICAC have dealt with these matters appropriately, both in the manner in which they investigated and in their reporting to me.

COMPLAINTS

27. I have received one complaint since my appointment. The complaint in question was not within my jurisdiction because it was not a complaint about the Office of the ICAC or the Commissioner. Rather it appeared to me to be intended as a complaint to the ICAC, to whom I referred it.
28. The reason for this low volume of complaints is obviously the fact that the Office of the ICAC is in start-up phase and unsurprisingly has not yet completed any investigations. When that occurs, I anticipate an increase in complaints. That would reflect my New South Wales experience as Inspector.

EVALUATION OF THE PERFORMANCE OF THE ICAC AND THE OFFICE OF THE ICAC

29. The Office of the ICAC has provided me with the following reports:
- a. Northern Territory ICAC: First 100 Days on 12 March 2019
 - b. (Draft) Performance Report 2018-2019 on 16 August 2019.

30. I will not repeat or attempt to summarise either document-they are or will be, in the case of the Performance Report, publicly available by the time I present this report.
31. In addition, as I have mentioned above, I have had lengthy and helpful meetings with the Commissioner and General Manager.
32. I set out below my views as the present situation of the Office of the ICAC and my evaluation of its performance. I also indicate and reflect on a number of issues the ICAC now faces. In doing so, I wish to emphasise that I evaluate the performance to date of the Office of the ICAC, the Commissioner and General Manager as outstanding. Any comments I make should not be interpreted as criticisms of them. They have created, virtually from scratch, an organisation which, if properly resourced, will be an effective anti-corruption agency and an asset to the public administration of the Northern Territory.
33. The General Manager has identified a three phase strategic plan leading to a fully functional integrity agency. It is appropriate that I quote that three phase plan:

Establishment:

The establishment phase recognises the urgency to launch and socialise a functioning Commission.

Physical environment:

Design, fund and equip a premises capable of catering for a fully funded ICAC (followed focus).

Procure equipment vehicles, communications, physical exert management requirements.

Contract out computer forensics, surveillance and telephone intercept.

IT source a case management system and leveraged access to specific law-enforcement databases and licenses.

Documents & Processes: develop a bespoke staffing model, draft job descriptions, recruit a high-performance team within NTPS guidelines and implement a performance management process with individual charters.

Develop investigation plans, risk matrices and action registers, suitable for complex investigations.

Important fine-tuned instruments to exercise coercive thousand service examinations. Develop a transparent referral assessment process that showcases independence and objectivity.

Business planning cycle:

Draft: *Budget Estimates and Key Performance indicators, funding cases and our annual reporting template.*

Socialisation: *Develop a stakeholder engagement strategy, intranet presence and marketing strategy, designed to integrate the Commission into the wider NTPS and inform the public that "the doors are open".*

Normalisation: *The normalisation phase requires us to "lead" the Commission by formalising its identity and "manage" the Commission by identifying potentially fatal risks entry.*

Vision mission - (Leading): *Create a vision, mission and business plan with milestones and deliverables capable of driving operational activity and satisfying government expectation in terms of the efficiency and effectiveness.*

Governance Framework - (Managing): *Commissions typically assess the framework of other government agencies which guides them towards stronger frameworks and an enhanced corruption prevention stance. Accordingly we need to develop policy, procedure, practice, internal audit processes and risk treatments to protect the Commission's position and reputation.*

Operational Activity: *Initial operational activity will be reactive and opportunistic, rather than pursuing our strategic objectives. This is a prize opportunity to bond the team and test our processes. We'll make mistakes during this period will need to phase operational activity and consider our public profile.*

Understanding the Environment: *Conducting an environmental scan of our jurisdiction is crucial to (1) identify areas of greatest risk/threat to allow us to prioritise our resourcing and (2) establish a baseline to measure our outcomes, both quantitative and qualitative.*

Strategic Focus: *The timings of the establishment and normalisation phases are scalable and dependent on external support provided by government and internal efficiencies that we create. Next challenge lies in maintaining our operational tempo, whilst looking over the horizon, creating a Commission capable of servicing future requirements.*

Capability development: *Government have a vision derived from public expectation and articulators refer to Act and subsequent speech and releases.*

We inform government of the size of the problem, (based on our environmental scan) and develop our capability and capability picture, which will assist in redressing the misconduct and corruption problem.

We perform a national stock-take of integrity agency capabilities and approach government in terms of capability and capacity, supported by business cases and funding submissions.

Maximising Impact: *The integrity agency serves a large jurisdiction with very limited resources. The Act allows for a number of outcomes ranging from: education and prevention, "devices" to affected agencies, parliamentary reports, private and public hearing outcomes and monitoring and reviewing recommendations to ensure ongoing accountability.*

34. At this time, Stage I Establishment has been substantially completed and Stage II Normalisation is underway.
35. Thus, a fully functioning office is now established. On creation, the Office of the ICAC comprised the Commissioner himself, and the employees (including three investigators) transferred from the Office of the Commissioner for Public Interest Disclosures, a total of nine personnel. Entirely lacking was a dedicated assessments team, whose responsibility was to assess each of the complaints that are received by the Office of the ICAC. The assessment function seems to me crucial to any integrity agency. That has now been remedied and there is now an assessment team comprising a Manager, Assessments and three Project Officers, Assessments.
36. The investigation team has been amplified so that it now comprises (or will comprise when staff vacancies are filled) a Manager, Investigations, five senior Investigations Officers, three Investigation Officers and an Administrative Assistant.
37. Total staff now comprise 23 personnel of whom seven have been seconded from other agencies, five are on contract and the remainder permanent. In addition, there are the Commissioner and the General Manager.
38. I evaluate these arrangements as satisfactory. I consider relevant resourcing issues in more detail below.
39. I note that the significant legacy issue referred to in paragraph 24 above caused significant delays in implementing the ICAC's strategic plan. Those issues have, however, been resolved as stated above.

40. Key decision-making committees have been established, the Corporate Executive Committee, the Operations Committee and the Audit Risk and Compliance Committee. I propose to monitor these Committees and audit their minutes.
41. A fully functioning office is now established with high quality staff.
42. Finally, on this topic, sections 22, 96, 106 and 129 of the Act require the ICAC to issue and keep under review certain guidelines and directions. These guidelines and directions are critical to the proper functioning of the Act and must be observed by public bodies and public officers. The legislation requires the following matters to be covered:
- a. Directions and guidelines governing the reporting to the ICAC of improper conduct;
 - b. Directions and guidelines governing how a recipient of a voluntary protected communication is to deal with that communication;
 - c. Guidelines and Practice Directions for ICAC staff; and,
 - d. Guidelines for public bodies and public officers concerning frameworks and practices for minimising risks of retaliation.

The ICAC has issued the guidelines and directions above, except for the guidelines for public bodies and public officers concerning frameworks and practices for minimising risks of retaliation. I note, however, that the ICAC has undertaken consultation on a discussion paper and is intending to issue these guidelines by the 30 November 2019 deadline set out in the Act.

COMPLAINTS AND COMPLAINT ASSESSMENTS

43. From November 2018 to 30 June 2019 the Office of the ICAC had received 254 reports of conduct alleged to fall within the statutory concepts of improper conduct, corrupt conduct, misconduct, unsatisfactory conduct and breach of public trust as those terms are defined in sections 9-13 of the ICAC Act. By 19 August 2019, 318 such reports have been received.
44. The Office of the ICAC informs me that of those 318 complaints, 114 have been assessed, of which 47 have been determined to require no further action and closed, 21 referred to other agencies for action and 22 passed for investigation. The assessment staff are currently processing reports at an average rate of 20 per fortnight. It would be unrealistic to expect any higher rate given the complexity of any such assessment.
45. I am satisfied that the assessment process and the procedures established to deal with the reports are appropriate.
46. Naturally, it is to be hoped that the matters determined and accepted for investigation start to progress to finality shortly and public hearings, as appropriate, commence. Given the enormous task of establishing the Office of the ICAC, starting it and creating appropriate systems, it is understandable that this has not occurred. I understand the Commissioner has in mind public enquiries into at least two legacy matters, that is, matters which arose before passage of the ICAC legislation and date back some years.
47. On this topic, there may have been a public expectation that the ICAC would begin producing results, conducting public hearings and making findings of corrupt conduct immediately upon its inception. To the extent such a perception exists is unrealistic. Creation of an

effective anti-corruption agency takes time, skill and care and any attempt to accelerate the process unduly risks injustice, damage to the agency's reputation and ineffectual processes.

48. In summary, my evaluation of these matters is that the Office of the ICAC is dealing with them in a satisfactory manner.

PUBLIC AND PUBLIC SERVICE EDUCATION

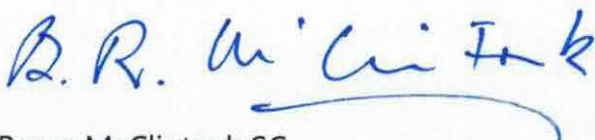
49. An important aspect of any integrity agency is an educative function. That is, to make known both to the public and public officers the functions of the agency and to emphasise corruption prevention to them so that they clearly understand the necessity for integrity in public office.
50. The Office of the ICAC has conducted more than 50 information sessions across the Northern Territory and approximately 1400 public servants have attended ICAC training. The degree of satisfaction with the information sessions is high.
51. My evaluation of these functions is that they have been performed satisfactorily by the Office of the ICAC. It is clear that the office has achieved significant penetration into the community and the public service.
52. Despite these matters, there is a concern on the part of the ICAC that certain agencies are reluctant to refer appropriate matters to the ICAC. If such a culture exists, it must change. Equally, it has been suggested to me that some agency staff are reluctant to refer matters to the ICAC because of fear of reprisal despite the statutory requirements to do so. If that is the case it is highly regrettable, and action should be considered by way of legislative amendment to strengthen whistle-blower protection. If, as the General Manager has informed me, 16 out of 16 whistle-blowers have had reprisals taken against them, it is extremely disturbing. One issue may be (and it is not for me to express any concluded view) that the responsibility for whistle-blower protection rests with the whistle-blowers own agency. Consideration should be given to allocating such responsibility to the Office of the ICAC itself.

OTHER MATTERS

53. The resourcing of the Office of the ICAC is a matter of concern. No integrity agency can operate effectively without adequate resourcing and, specifically, it is critically necessary that any such entity have access to forensic accounting services and a covert surveillance and operations capacity. At present, the Office of the ICAC has one forensic accountant on a contract basis, and limited covert capacity. This is highly unsatisfactory for an integrity agency of this kind,
54. If the Northern Territory administration wishes to have an effective ICAC, consideration should be given to increasing its resources to enable employment of at least two more investigators and the creation of a forensic accounting team and covert capacity. It may also be desirable to employ an intelligence analyst.
55. In raising these matters, I should state that I am fully aware of the budgetary constraints applied to the Northern Territory administration and, indeed, to all Australian governments. I am also aware that accounting and covert capacity are expensive to resource. That said, an effective anti-corruption agency inevitably saves public money and it might well be regarded as a false economy not to fund it adequately.
56. I understand that funding has now been obtained for establishment of an electronic case management system, a tool which is essential for an anti-corruption agency. The Commissioner informs me that tenders have been called for and that when implemented the system will cut the time for individual assessments of complaints by about 60%.

CONCLUSION

57. I am satisfied that the Office of the ICAC, the Commissioner himself and his staff have acted within power and in compliance with the Act and other relevant legislation.



Bruce McClintock SC
Inspector ICAC

30 September 2019