

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

September 2021

## Contents

1. EXECUTIVE SUMMARY .....	3
2. FUNCTIONS AND DUTIES OF INSPECTOR - STATUTORY FRAMEWORK.....	4
3. THE NORTHERN TERRITORY INSPECTORATE .....	12
4. ADMINISTRATIVE MATTERS.....	13
5. RELATIONS WITH THE OFFICE OF THE ICAC.....	13
6. COMPLAINTS .....	14
7. EVALUATION OF THE PERFORMANCE OF THE ICAC AND THE OFFICE OF THE ICAC .....	26
8. PUBLIC AND PUBLIC SERVICE EDUCATION .....	29
9. COMPLAINTS AND COMPLAINT ASSESSMENTS .....	29
10. INVESTIGATIONS .....	30
11. CONCLUSION .....	34

## 1. EXECUTIVE SUMMARY

1. This is my Annual Report as Inspector of the Independent Commissioner against Corruption for the financial year 2020-2021 pursuant to sections 136 and 137 of the *Independent Commissioner against Corruption Act 2017* ("ICAC Act"). Those provisions, respectively, require the Inspector to evaluate the performance of the ICAC for a financial year and to provide the Report to the ICAC Minister, that is, the Chief Minister, within three months after the end of the financial year to which the report relates. This is the second such report that I have prepared since my appointment by the Administrator of the Northern Territory as Inspector of the Office of the Independent Commissioner against Corruption (OICAC or Office of the ICAC) Northern Territory on 28 September 2018.
2. As required by the legislation, I have evaluated the performance of the OICAC for the financial year 2020-2021 and set out the results of that evaluation below. In summary, I am generally satisfied with the performance of the OICAC although, particularly towards the end of the financial year in question, several issues arose which have caused me concern. For several reasons which I will set out below, it is too early to come to a concluded view about such matters. One reason is the pendency of several items of litigation seeking to challenge decisions, findings, and reports of the OICAC. Clarity will only be obtained when the Supreme Court of the Northern Territory determines the proceedings in question, and I have sufficient time to digest the Court's reasons. Nevertheless, I propose to monitor closely the areas and issues that have caused me concern and, if appropriate, provide a follow-up special-purpose report pursuant to section 140(3) of the ICAC act to determine such matters finally.
3. From the perspective of the OICAC of most significance is that 2020-2021 was the final full year as Commissioner of the founding Commissioner Mr Kenneth Fleming QC. Mr Fleming retired on 5 July 2021 just after the end of the reporting period and his position has been taken by Mr Michael Riches, formerly Deputy Commissioner of the South Australian Independent Commission against Corruption.
4. From the perspective of the Inspectorate, the most significant aspect of 2020-2021 is a substantial increase in the number and complexity of complaints received by my office. In the financial year 2019-2020, I received seven complaints, only two of which were of any real substance. One of those two, while received in 2019-2020, was determined by me in 2020-21 and is considered below. The other is the matter which caused me to require Mr Fleming to disqualify himself from involvement in the OICAC's handling of the shooting of Kumanjayi Walker on 9 November 2019. That is discussed in paragraph 35 of my annual report for 2019-2020. In contrast, in 2020-2021, I received more than double the number received in the previous reporting period.

## 2. FUNCTIONS AND DUTIES OF INSPECTOR - STATUTORY FRAMEWORK

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

### **134 Appointment of Inspector**

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

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

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

*(2) A person is an eligible person for appointment as Inspector if:*

*(a) the person is an eligible person to be appointed as the ICAC; and*

*(b) the person is not and has not been, at any time in the previous 12 months:*

*(i) the ICAC; or*

*(ii) a member of ICAC staff.*

*(3) The Inspector holds office:*

*(a) for the period, not exceeding 5 years, specified in the instrument of appointment; and*

*(b) on the conditions (including conditions about remuneration, expenses and allowances) determined by the Administrator.*

*(4) The Inspector's conditions of office:*

*(a) cannot provide any conditions (for example as to remuneration) that are contingent on the Inspector's performance in office; and*

*(b) cannot be varied during the Inspector's term in office.*

*(5) If a person is appointed as Inspector for less than 5 years, the person may be reappointed, if still eligible, but not so that the aggregate period of appointment exceeds 5 years.*

6. Subsections (1A) and (1B) were added by amendment to the legislation after my appointment so did not apply to my appointment. See *Integrity and Accountability Legislation Amendment Act 2019*. Section 18 of that Act amended section 134 of the ICAC Act to insert the two sub-sections in question. I fully support those provisions. The Territory Legislature to which, through the Chief Minister, the Inspector ultimately reports, should be involved in the appointment of the Inspector, it seems to me.

7. The Administrator of the Northern Territory appointed me as Inspector of the Office of the Independent Commissioner against Corruption (OICAC or Office of the ICAC) Northern Territory on 28 September 2018. I am also the Inspector of the New South Wales Independent Commission against Corruption having been appointed to that office on 1 July 2017.

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

8. 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.
9. The Administrator made a Determination of Conditions of Inspector at an Executive Council Meeting on 29 November 2018.
10. 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.

Subject to the matters referred to in paragraphs 15-17 below, no additional functions have been conferred on me under the ICAC Act or any other Act.
11. As stated above, section 136 requires the Inspector to evaluate the performance of the ICAC. In doing so, the Inspector must consider:
  - (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.
12. Section 137 requires the Inspector to give a copy of the proposed report on evaluation to the ICAC and to afford a reasonable opportunity to comment on the proposed report and to include a fair representation of the ICAC's comments in the report. Sub-sections 137(3) and (4) require the Inspector to provide the report to the Chief Minister within three months of the end of the financial year to which it relates, and the Chief Minister is required to table this in the Legislative Assembly within six sitting days.
13. Section 138 deals with complaints about the ICAC, the ICAC's office and ICAC staff members. It permits any person to complain about such people to the ICAC itself or to the Inspector. If the complaint is made to the ICAC, the ICAC must notify me as Inspector within 14 days. I am empowered

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

(section 138(3)) to deal with a complaint in any manner I consider appropriate. Under section 139, the Inspector is entitled to full and free access to the ICAC premises and all items in the possession and control of the ICAC for an evaluation under section 136 and dealing with a complaint under section 138.

14. Section 140 provides the Inspector with further powers, but it is unnecessary to set them out here. Section 142 deals with staff of the Inspector and, in effect, enables staff of an existing agency to be allocated to the Inspector.
15. The Surveillance Devices Act 2007 confers a significant additional function on me as Inspector. That legislation relevantly provides, as follows:

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

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

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

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

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

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

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

**71A Audit of records – the ICAC**

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

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

No application for such an authority has been made to date by the ICAC which means that it has not been necessary for me to perform my duties under this legislation. The ICAC has advised that an update package will be prepared for me, as the Inspector, prior to any application being made under this Act.

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

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

- (1) *The Inspector may at any time:*
  - (a) *inspect the records of the ICAC to determine compliance by the ICAC and members of ICAC staff with Part 2, Division 2 during any period; and*
  - (b) *report to the Minister about the results of the inspection.*
- (2) *The Inspector may do anything necessary or convenient for the purposes of subsection (1).*

**16 Regular inspections of ICAC records**

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

- (1) *At least once in each period of 6 months, the Inspector must inspect the records of the ICAC to determine compliance by the ICAC and members of ICAC staff with Part 2, Division 2 since the last inspection.*
- (2) *Not later than 3 months after the end of each financial year, the Inspector must report in writing to the Minister on the results of inspections carried out in that financial year.*

**16A Report on contravention**

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

- (a) *allow the ICAC an opportunity to provide written comments in respect of that matter; and*
- (b) *include in the report under section 15(1)(b) or 16(2):*
  - (i) *a report on the contravention; and*
  - (ii) *a copy of the written comments of the ICAC.*

**16B Notification of report**

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

- (a) *must notify the Commonwealth Minister, in writing, that the report has been given; and*
- (b) *must provide the ICAC with a copy of the report.*

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

18. On 20 February 2020 the Legislative Assembly passed a resolution establishing a Standing Committee on the ICAC in the following terms:
  1. *That this Assembly establishes a Standing Committee on the ICAC and designates it receive reports and perform other functions in relation to the Independent Commissioner Against Corruption (Commissioner) pursuant to Section 5 of the Independent Commissioner Against Corruption Act 2017 (the Act).*
  2. *The functions of the Committee are to:*



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

- a. *perform the functions of the Assembly Committee under the Act;*
  - b. *examine each Annual Report of the Commissioner and the Inspector under section 128 and 137 of the Act;*
  - c. *report to the Assembly on matters relating to tabled reports which have been referred to the Legislative Assembly by the Commissioner under section 53 and 54 of the Act;*
  - d. *examine trends in similar bodies in Australia and internationally, including trends in the legislation and administration of these bodies, to ensure the NT ICAC remains fit-for-purpose.*
3. *The Committee's functions do not include:*
- a. *investigating a matter relating to particular conduct, or*
  - b. *reconsidering a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or*
  - c. *reconsidering the findings, recommendations, determinations or other decisions of the Commissioner or the Inspector, in relation to a particular investigation, preliminary inquiries, audit, review, referral, or complaint.*
4. *The membership of the Committee will be two Government Members of which one will be Chair and the other the Deputy Chair of the Committee, one Opposition Member and one non-party aligned Member. Membership of the Committee will be subject to conflict of interest considerations to ensure members are free from perceived or actual bias.*

I welcome the establishment of the Standing Committee and look forward to working with it and its members to the extent that they feel desirable. I am happy to discuss any matter relating to my office as Inspector with the Committee, whether formally or informally, except those proscribed by paragraph 3 of the resolution. I appeared before the Committee in what I considered to be a frank and useful exchange for the first time on 5 November 2020.

19. I note that Mr Greg Shanahan PSM is carrying out a review of the ICAC Legislation under the auspices of the Department of the Chief Minister and Cabinet (CM&C). While it occurred after the 2020-2021 reporting period, it is appropriate to mention that I addressed two topics of possible legislative reform as Inspector, first, the powers of the Inspector to obtain information and, secondly, whether the legislation should include a definition, such as misconduct or illegality, of the matters concerning which complaints may be made to the Inspector about the OICAC. After contact with Mr Shanahan, I learned that he already intended to address the second of those two topics in his report. Consequently, I made a submission limited to the first of the topics in the following terms:

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

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

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

**57C Powers of Inspector**

The Inspector—

- (a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and
- (b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and
- (c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and
- (d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and
- (e) may investigate and assess complaints about the Commission or officers of the Commission, and
- (f) may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and
- (g) may recommend disciplinary action or criminal prosecution against officers of the Commission.

**57D Inquiries**

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

**57F Incidental powers**

- (1) The Inspector has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector's functions. Any specific powers conferred on the Inspector by this Act are not taken to limit by implication the generality of this section.

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

(2) Section 40 of the Surveillance Devices Act 2007 does not apply to the use, publication or communication of protected information within the meaning of that Act in relation to the exercise of the Inspector's functions under section 57B.

**57G Former officers of the Commission**

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

*My concern is that section 139 of the Northern Territory legislation may, in certain circumstances, be insufficient to enable the Inspector to carry out adequate enquiries. In particular, the Assembly may think it desirable to grant to the Inspector the ability to compel persons other than OICAC staff to provide information, including documents, to him. I have to say that in my four years as the New South Wales Inspector I have never used the powers granted by section 57D and anticipate completing my five year term without ever having done so. Nevertheless, it may be useful to have such a power as a backup if persons outside the OICAC decline to provide information relevant to an enquiry. I should add that I do not believe that any enquiry I have conducted has been impacted by the absence of such a power but, nevertheless, it seems appropriate part of the armoury of powers that an Inspector should have.*

*Thank you for considering this submission.*

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

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

### 3. THE NORTHERN TERRITORY INSPECTORATE

21. The Inspectorate maintains the following website, to which I invite reference, and the stated methods of contact, particularly for the making of complaints:
- (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) Methods of contact. These are principally for receiving complaints and liaising with CM&C. The email addresses are: [Bruce.Mcclintock@oiicac.nt.gov.au](mailto:Bruce.Mcclintock@oiicac.nt.gov.au); [inspector@oiicac.nt.gov.au](mailto:inspector@oiicac.nt.gov.au); [admin@oiicac.nt.gov.au](mailto:admin@oiicac.nt.gov.au). The second address is the one specified on the website for receiving complaints.
22. Funding for my office and remuneration is the responsibility of CM&C. It would have been inappropriate for my office to be an expense of the ICAC (which had been proposed) because of the nature of the relationship between the Inspector and the ICAC established by the legislation.
23. My appointment as Inspector is part-time and I perform my duties on an “as needed” basis. I have, since my appointment in 2018, tried to visit Darwin at least twice a year to monitor the performance of the OIICAC and otherwise carry out my statutory duties as Inspector.
24. I had intended to visit Darwin in August 2020 for the purpose of meeting with the Commissioner and the Deputy Chief Executive Officer to carry out my evaluation of the performance of the Office of the ICAC for my 2019-2020 Report. Unfortunately, the ravages of coronavirus and COVID-19 in the southern states prevented me from doing so. Instead, I had on 24 and 25 August 2020 lengthy Microsoft Teams conferences with both the Commissioner and the Deputy Chief Executive Officer. I do not regard that as an entirely satisfactory substitute for face-to-face meetings but there was no alternative.
25. I was able to visit the Northern Territory in the period 2-5 November 2020, the occasion when I had the meeting with the Legislative Assembly ICAC committee referred to above. I also met with both the Commissioner Mr Fleming QC and the Deputy Chief Executive Officer, Mr Matthew Grant. I also visited Darwin in the period 12-16 April 2021, when I met with the Chief Minister, the Honourable Michael Gunner and the Chief Executive of CM&C, Ms Jodie Ryan. I also met with Ms Vicki Telfer, the Commissioner for Public Employment, to deal with several issues, one of which was one of the groups of complaints considered below.

26. I had also hoped to visit Darwin in August-September 2021 for the purpose of carrying out the evaluation of the performance of the OICAC required for this Report. Regrettably, because of the COVID-19 situation in New South Wales that has not been possible. I have nevertheless consulted extensively with the new Commissioner, Michael Riches and with the Deputy CEO, Matthew Grant. While undoubtedly preferable to have visited Darwin and to have had face-to-face meetings, I have sufficient information to carry out the evaluation required by the legislation.

## 4. ADMINISTRATIVE MATTERS

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

## 5. RELATIONS WITH THE OFFICE OF THE ICAC

28. 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 existed (in my perception) between myself and Mr Fleming QC during his term of office and now between myself and the new Commissioner, Michael Riches and the ICAC staff with whom I have dealt.

29. Relations between myself and the Office of the ICAC have been formalised by a Memorandum of Understanding (MOU) executed by the Commissioner and me in April 2019. A copy of the MOU was attached to the Preliminary Report that I submitted to the Chief Minister on 30 September 2019.

30. Pursuant to the MOU (and section 138 of the ICAC Act), the Commissioner or the Deputy Chief Executive Officer have disclosed a number of significant matters to me which I record below.

31. I am satisfied, subject to the matters referred to in paragraphs 62-68 below, that the Commissioner and the Office of the ICAC have dealt with these matters appropriately, both in the way they investigated and in their reporting to me.

## 6. COMPLAINTS

32. As I have indicated above, section 135(1)(b) of the ICAC Act specifies that my functions as Inspector include receiving and dealing with complaints about the ICAC. Section 138(3) empowers me to deal with a complaint in any manner I consider appropriate. While there are no criteria specified for dealing with complaints (an issue Mr Shanahan has indicated he is considering in his enquiry into the legislation), I consider, nevertheless that a complaint may only be upheld if it demonstrates some form of impropriety or erroneous approach, whether factually or legally on the part of the ICAC. Certainly, it is not enough, for example, that I might not have reached the same decision as that which is the subject of the complaint. Further, because a decision by the ICAC to undertake an investigation involves a correlative decision by the ICAC to expend its limited resources, I consider that the ICAC must be permitted a wide discretion as to which matters it decides to investigate or not. Thus, I would require some form of impropriety on the part of the ICAC to be convincingly established before I upheld a complaint about a failure on its part to investigate a complaint to it. These principles have guided, and will continue to guide, my approach to dealing with the complaints made to me.
33. There is a further matter involving the appropriate approach to the complaint handling function imposed on the Inspector by the legislation. Several complaints received by my office during 2020-2021 involved what might be called employment issues, that is, the way in which employees of the OICAC felt they had been treated as employees. One such complaint, for example, involved allegations that the employee in question had been abused and sworn at by other employees. Substantially for the reasons set forth above, it did not appear to me appropriate to deal with complaints that raised solely employment issues, as opposed to matters involving the administration of the ICAC Act or alleged impropriety in such administration. While my powers under the Act are very broad, I consider that I should limit the matters I accept for consideration to those involving some form of alleged impropriety or misconduct in the administration of the legislation. There are several reasons for this. The first is that neither I nor my office has any expertise in employment matters and is not equipped to deal with them. The second is that there are many other avenues to deal with employment matters under the law of the Northern Territory. For example, the Commissioner for Public Employment has both the expertise and the statutory power to deal with such matters. Consequently, I have referred such matters to the Commissioner for Public Employment. This is discussed further below.

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

34. In the following paragraphs I will set out the complaints I regard as sufficiently significant to be drawn to the attention of the Chief Minister and, through him, to the Legislative Assembly. In some cases, for obvious reasons, I have anonymized the name of the complainant.
35. I received a complaint from Complainant A alleging that he and his wife were victims of corruption on the part of the Government of the Northern Territory in the period 1976-1988 and corruption on the part of the then Chief Minister, Paul Everingham. The Commissioner rejected Complainant A's complaint in the following terms:

*You should be aware that I am only able to investigate a very small number of matters and, as per the Act, is required to prioritise the most serious, systemic, sensitive and contemporary improper conduct including serious corrupt conduct and anti-democratic conduct.*

*After consideration of the information provided with your report, I have determined that your report will not be investigated or referred to another agency for investigation.*

*This decision has been made on the basis that relevant and reliable evidence of improper conduct that may have occurred over 40 years ago will be difficult or impossible to obtain, the likelihood of an outcome being achieved given the time elapsed since the incidents and the extent in which the matters have already been considered by the courts . . . .*

Complainant A expressed his criticism of the Commission's decision in the following terms:

*The commissioner's conclusions are totally unacceptable to us. In fact, we consider them highly insulting – given the gravity of the charges and the evidence laid before him. It is a totally misleading and deceptive claim – that ....*

*the basis that relevant and reliable evidence of improper conduct that may have occurred over 40 years ago will be difficult or impossible to obtain, the likelihood of an outcome being achieved given the time elapsed since the incidents and the extent in which the matters have already been considered by the courts ....*

*– when that evidence has been laid before ICAC in comprehensive detail – when the court case itself attests to the existence of just ONE example of the corrupt conduct. The case dealt with the RESPONSIBILITY FOR PAYMENT of the account – not the corrupt conduct which brought it about – a fact which should have been patently clear to the Commissioner when making his determination.*

I decided that there was no basis for interfering with the Commissioner's decision and so informed Complainant A of that decision on 1 September 2020 as follows:

*I have considered the materials which you have supplied and the response by the ICAC which I have quoted above. The reasons expressed by Mr Fleming QC, the Commissioner, appear to me to be valid. Certainly, there is no basis for any conclusion that the decision not to investigate your complaint was improper or involves some erroneous construction of the legislation. Indeed, it appears to me to be well within the discretion to which I have referred. Your assertion in response to Mr Fleming's rejection of your complaint that the records still exist even though the events took place between 1976 and 1988 seems to me to miss the point being made by him in the passage I have quoted above. Any investigation of events taking place more than 30 years ago may well turn out to be futile and involve the waste of public monies, factors the Commissioner was entitled to consider.*

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

Complainant A was dissatisfied with my decision and asked me to reconsider it which I declined to do, informing him of that decision on 9 October 2020.

36. Complainant B, by her complaints dated 27 May and 23 September 2020, raised an issue of considerable substance which I found disturbing, but not because of any wrong conduct on the part of the OICAC, as I will explain. Complainant B had made what was undoubtedly a protected disclosure to the Public Interest Commissioner in 2015. As a result of that disclosure, Complainant B was entitled to whistle-blower status. Subsequent criminal proceedings were commenced involving the subject matter of the disclosure made by Complainant B. By that time the OICAC had taken over the functions of the Public Interest Commissioner and it fell to the OICAC to deal with an application made by the defendant in the criminal proceedings for access to the protected disclosure. Ultimately, however, the Northern Territory Supreme Court granted the defendant's application for access to Complainant B's disclosure, a matter that caused her great distress, as she made clear in her complaint to me. The core issue was who bore responsibility for the fact that this occurred. I determined this complaint on 26 October 2020 in the following terms:

*It appears to me that your complaints may be distilled into the following core allegations:*

- 1. That the OICAC did not do everything necessary to prevent your identity being disclosed. I note your assertion (p3 of your 23/9/20 letter) that it did not allow itself sufficient time, resources, or oversight to become expert in the case.*
- 2. That the OICAC did not communicate adequately with you or your lawyer to the extent that you felt "blind-sided" by [the Supreme Court's] decision when you learned of it.*
- 3. That the OICAC's response to your complaint is inadequate and some aspects eg: the reference to you making unreasonable demands, were designed to discredit you.*
- 4. That the OICAC failed to identify you as "their client" and consequently their actions were destined to fail because they did not have your best interests at heart or had no real understanding of how to protect those interests.*

*I will deal with each of these points.*

*As to 1, I do not agree. I consider that the steps taken by the OICAC were adequate in the circumstances. It retained the services of the Solicitor-General, the most senior Northern Territory Government lawyer and the second most senior lawyer in the Territory. Such representation was entirely appropriate, and I do not believe it could have been bettered. Nor do I agree that the OICAC did not allow itself sufficient time, resources, or oversight. There are two reasons. The first is that the timetable for compliance with the subpoena was, in effect, set by the Supreme Court and it was mandatory for the OICAC to comply with the dates specified by that Court for such compliance. Secondly, and more importantly, it was up to Ms Brownhill QC, the Solicitor-General, to get on top of the materials for application in relation to the subpoena. She was senior counsel and I would expect her, as opposed to her client, the OICAC, to put herself in a position where she was sufficiently in command of the material to be able to put the OICAC position, and yours, fairly to the Court. I have*



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

*no reason to doubt that she did so. Further, while of enormous significance to you, the legal issues involved in the application are relatively straightforward and a barrister of Ms Brownhill's competence would require very little time to do them justice.*

*I do not believe the OICAC could reasonably have done anything more than it did. Certainly, I do not believe that it can be blamed for the decision to release your disclosure and the consequent disclosure of your identity. That came about because of [the Supreme Court's] decision, not any failure on the part of the OICAC.*

*As to the second point, see my comments in relation to your fourth point set out below.*

*As the third point, I do not agree. Specifically, I do not believe that the response by the OICAC to me was designed to discredit you. It certainly did not have that effect in my eyes-I interpreted the reference to "unreasonable demands" and your swearing during the 15 May 2020 telephone conversation as the justifiable reaction of a person who was extremely upset as a result of learning that information which she had submitted to the PID Commissioner on a confidential basis was to be made public as a result of a court decision. I drew no conclusion adverse to you from those references. I do not regard your reaction as described by the OICAC as anything other than appropriate in circumstances which were extremely distressing for you.*

*As your second and fourth points, I note the following comment by the OICAC which I have extracted from the material set out above:*

*There is no customer service requirement detailed in the ICAC Act, however despite the fact that they were legally represented, there is some merit in [Complainant A's] observation regarding the lack of pastoral care provided to the whistle-blower. This point is noted and will form part of our future practice when dealing with whistle-blowers, even those that are legally represented.*

*I agree with you and, indeed, with the OICAC in the passage quoted that the way in which it dealt with you could definitely be improved. There does seem, from all the material I have seen, to have been a failure to communicate with you and keep you up to date with developments. I am concerned that you were not informed as to what was occurring during the court process. While technically the subpoena was directed towards the OICAC, the person with the greatest interest in resisting it was obviously you. That seems to me to indicate strongly that the OICAC should have borne your interests in mind and kept you informed of what was occurring.*

*These matters do not appear to me to amount to misconduct on the part of the OICAC or any officer thereof, so I do not propose to make any such finding in response to this aspect of your complaint. I do, however, propose to require the OICAC to develop a protocol to deal with whistle-blower communications in situations such as the one in which you found yourself and to enhance, to use the OICAC's phrase, "pastoral care".*

*These matters aside, I propose to take no further action in response your complaint. In the final analysis, I disagree with you that the very real damage which I accept was done to you was a result of a failure on the part of the OICAC. As stated, it obtained competent legal representation and I do not consider it had an obligation to go further. As indicated, I propose to oversight the whistle-blower disclosure issues as well as to require the development of the protocol mentioned in the preceding paragraph.*

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

37. Complainant C raised issues concerning the conduct of an officer of Licensing NT. As it was apparent that he had not made any complaint to the ICAC, I considered that I did not have any jurisdiction or power to deal with his matter and accordingly dismissed it on 16 September 2020.
38. The essence of Complainant D's complaint against the OICAC was that it wrongfully failed to investigate a complaint he made to it on 1 December 2018. Complainant D alleged that he received an electric shock at Nhulunbuy on 4 March 1998 while carrying out a direction by his workplace supervisor who knew the item of equipment he directed Complainant D to touch was live. In summary, Complainant D asserted that, in giving the direction referred to, the supervisor had attempted to murder Complainant D. He made allegations of misconduct against several Northern Territory public bodies including the Northern Territory Police, WorkSafe, the Coroner and the Ombudsman and several individuals, as well as the OICAC itself. He assertedly reported it to Police, to the Ombudsman and politicians but no action was taken. At the time of the shock, Complainant D was employed at Yirrkala Business Enterprise, a private business over which the OICAC has no jurisdiction. He further alleged that various health professionals conspired to have Complainant D admitted to a psychiatric facility on 20 March 1998 following events that took place within the workplace. Over the years Complainant D had made reports or complaints to NT Worksafe, Northern Territory Police (to the Commissioner of Police), the NT Ombudsman, the NT Health Complaints Commissioner, the Chief Minister (Clare Martin), the Attorney General (Natasha Fyles) and the Australian Federal Police. He initiated court proceedings in 2001 but outside the limitations period. Magistrate Bradley decided there was no valid reason for this delay and dismissed the proceedings. I dismissed Complainant D's complaint on 26 October 2020 in the following terms and for the reasons stated:

*I have considered the materials which you have supplied and the responses by the ICAC which I have quoted above and have determined to reject your complaint. The reasons expressed by Mr Fleming QC, the Commissioner, in his letter dated 26 November 2019 and the OICAC email dated 29 November 2019 appear to me to be entirely valid. Those reasons were, in effect, that your complaints could not be substantiated because of the lapse of time and absence of substantiating evidence. Certainly, there is no basis for any conclusion that the decision not to investigate your complaint was improper or involves some erroneous construction of the legislation. Indeed, it appears to me to be well within the discretion to which I have referred. Any investigation of events taking place more than 20 years ago may well turn out to be futile and involve the waste of public monies, factors the Commissioner was entitled to consider.*

*Further, it is apparent to me from my review of the materials supplied to me by the OICAC, including Mr Grant's email dated 29 September 2020 which, as I have indicated above, is attached to this email to you, that the staff of the OICAC behaved with complete professionalism in assessing your complaint, took your allegations seriously and expended very considerable time and energy in dealing with it. It is regrettable that you are dissatisfied with the OICAC response to you.*

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

*Finally, I wish to record my view that your assertion to the Chief Minister in your 1 August 2020 letter that Mr Fleming had "perverted the course of justice" is wholly without foundation. There is nothing in the extensive materials that you have supplied that provides any support for so serious an allegation. Rather, the actions taken by Mr Fleming and the agency he leads in dealing with your complaint to it were entirely appropriate in the circumstances.*

*Accordingly, as I have indicated, your complaint to me will be dismissed. I propose to copy the OICAC with this email.*

39. Complainant E, who is serving a term of imprisonment in the Northern Territory, complained to me on 27 October 2020 that the OICAC had wrongfully rejected a complaint made by him to it. The essence of the complaint was that a child of the judge who presided over the trial at which he was convicted had formed a personal relationship with one of the jurors and that the trial judge knew of the relationship and covered it up. This allegation was itself based on a further allegation as to the date of birth of a child to the couple in question. While there was apparently a relationship between the trial judge's child and a member of the jury, the materials before the OICAC established beyond doubt that the relationship did not commence until after both the conclusion of the trial and sentencing of Complainant E, who, in any event, had been aware (as had his legal representatives) of the matters said to give rise to the issue and failed to raise them at any time during the proceedings in question. It appeared to me that both the allegation of impropriety on the part of the trial judge and the complainant's attack on the OICAC's decision to dismiss his complaint were completely baseless. Indeed, it appeared to me that they could be described as vexatious. Accordingly, I dismissed Complainant E's complaint to me on 14 December 2020 by letter in which I included the following:

*There is nothing in the materials which you have provided to me which suggests any form of impropriety or error of law on the part of the OICAC in the manner in which it dealt with your complaint. Further, it seems apparent that the factual premise of your complaint has not been established. Put another way, there is no basis for the conclusion that the persons to whom you refer were in a relationship during your trial.*

40. Complainant F raised issues about what he asserted was an encroaching embankment on his land which he thought various government agencies had failed adequately to deal with. The OICAC declined to accept his complaint. I agreed with the OICAC and dismissed Complainant F's complaint to me on 15 April 2021, saying this:

*There is nothing in the materials which you have provided to me or those I have received from the OICAC which suggests any form of impropriety or error of law on the part of the OICAC in the way it dealt with your complaint. Further, I note that the Commissioner in his letter to you dated 23 March 2021 expressed his reasons for declining to investigate your complaint in the following terms:*

Based on the circumstances described and evidence provided in your report, a reasonable suspicion to satisfy the elements of 'improper conduct' as prescribed in s9 of the Independent Commissioner Against Corruption Act 2017 cannot be formed.

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

*Based on the materials I have reviewed, including your original report to the Commissioner dated 16 July 2020 and your letter to the Commissioner dated 26 March 2021, the Commissioner was entitled to reach the view he expressed in his 23 March letter that a reasonable suspicion to satisfy the elements of "improper conduct" could not be formed.*

*Accordingly, I propose to dismiss your complaint.*

41. Complainant G was Mr Michael Tatham, the Clerk of the Legislative Assembly it seems to me simplest to set out the correspondence between myself and Mr Tatham. It is self-explanatory. Mr Tatham first raised an issue with me on 28 May 2020 by email in the following terms:

*During a consultative process, the three most senior officers of the Department of the Legislative Assembly (DLA) have formed a view it is necessary for me to write to you in the following terms.*

*I understand that I am required by the ICAC's Mandatory Reporting Directions and Guidelines that as a public officer and a Chief Executive Officer of a public body I must report any suspected improper conduct to the ICAC.*

*I note that while the Act provides for complaints about the ICAC to be made to the Inspector, the Act does not provide for reports of suspicion of improper conduct of the ICAC to be made to the Inspector to fulfil mandatory reporting obligations imposed by ICAC directions under section 22. The directions, as currently promulgated, do not make any such provision. Nevertheless, given the imprecise nature of the Directions, the scheme of the Act and general governance principles I presume that making a report to the Inspector will fulfil my obligations under section 22. If this correspondence to you does not fulfil my obligations under the ICAC Act your advice would be appreciated in order for me to communicate with the ICAC instead. My previous experience in reporting matters to the ICAC has resulted in inconsistent responses.*

*I have enclosed my submission to the ICAC Act review being conducted at the direction of the Government (attachment 1). As outlined in that submission, examination of the issues encountered by the Department of the Legislative Assembly in the operation of the Act raised a number of issues that related to the administration of the Act rather than the terms of the Act itself. One of those issues gives rise to a suspicion that the ICAC has breached section 88 of the Act.*

*The facts of the matter, as far as I am aware of them, are outlined in the ICAC's letter to the Chief Minister of 23 March 2021 which was tabled in the Legislative Assembly on 24 March 2021 (attachment 2), and the resolution of the Assembly of 25 March 2021 purporting to authorise the ICAC to inspect the Member for Blains' phones and laptops (attachment 3). I do not know if such an inspection occurred, but the request and subsequent resolution gives rise to a suspicion that it did, and this was in breach of the ICAC Act.*

*I note that the ICAC's letter states that when a claim of privilege was made the material was sealed but makes no reference to giving the material to the proper officer as soon as reasonably practicable as required by s 88(4). If no action was taken to arrange the proper officer, this is the initial breach.*

*I further note that, if action was taken in reliance on the Assembly's resolution, for which, as outlined in the attached submission, there appears to be no lawful basis for it having any bearing on the operation of the ICAC Act, then I suspect that the requirements of s 89(3) were not fulfilled, due to failure to provide the material to the proper officer.*

I replied to Mr Tatham on 1 June 2021 in the following terms:

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

*Thank you for your email and attachments of 28 May 2021. I acknowledge receipt thereof. I have read the contents of your email carefully but it is not clear to me whether you are making a formal complaint to me in my capacity as Inspector of the Independent Commissioner against Corruption pursuant to section 138 of the Independent Commissioner against Corruption Act 2017 or whether your letter was intended to be a compliance with the mandatory reporting obligations established pursuant to section 22 of the Act.*

*I would appreciate clarification of this matter so that I may take the appropriate action. If you are making a formal complaint to me, it will be necessary for me to pass your letter or a summary thereof to the Commissioner in order to afford him and his Office procedural fairness. If you are making a section 22 disclosure, I may have a similar obligation, but it is important that I understand which course you are taking.*

*I look forward to hearing from you.*

Mr Tatham replied also on 1 June 2021 as follows:

*Your question goes to the very heart of the confusion and a lack of clarity I continue to experience with this legislation.*

*From my understanding, I am obliged to make a report as soon as practicable, when it comes to my attention that there is conduct by a public officer or public body which I suspect is misconduct in breach of the ICAC Act.*

*In this instance, when consulting with colleagues about the review of the ICAC Act (being conducted by Mr Greg Shanahan for the relevant Minister), the First Clerk Assistant and the Deputy Clerk and I came to the conclusion that the ICAC breached section 88 of the ICAC Act when dealing with material seized from the Member for Blain.*

*We formed a view that the suspected breach is misconduct on the part of the ICAC.*

*Then we considered how to discharge our obligation to report the suspected misconduct.*

*We considered that by me writing to you, this should satisfy section 22 of the ICAC Act to report the matter. However as you have noted, you seek clarity as to whether we are making a section 22 report or making a section 138 complaint.*

*It is our view that I have made a section 22 report.*

*I have made a report because we formed a suspicion that misconduct has occurred because, the ICAC has by its own actions, disclosed it has failed to comply with the requirements of section 88 of the ICAC Act. The motion in the Assembly which purports to authorise the ICAC to be part of decision making about whether material seized from the Member for Blain is privileged or not, would not overcome a prior breach of the ICAC Act.*

*It became apparent to us that this was a suspected breach only after detailed consideration and discussion in the context of the consultation on the review of the ICAC Act.*

*The suspicion was crystallised and was formed last week, the communication disclosing the suspected breach was made to you as soon as practicable.*

*If you take the view that section 22 was not complied with when I reported to you, then I will be obliged to report to the ICAC.*

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

*Hopefully the review of the ICAC Act will clarify the obligations of a public officer in these circumstances.*

*When a public officer suspects the ICAC has engaged in conduct which breaches the ICAC Act, is the obligation on the public officer to report that suspected conduct discharged when reporting that suspicion to the Inspector?*

*If by reporting to you, my colleagues and I have discharged our mandatory reporting obligations, I will not be required to also report the suspected misconduct of the ICAC to the ICAC.*

*If you take the view that I have made a section 138 complaint and you cannot receive it as a 'report' and that I must report directly to Mr Fleming then I will comply by sending everything I have already sent to you to Mr Fleming (including this communication).*

*Given this communication is directly relevant to the two public officers mentioned above, I have copied them into this email so they are aware in the event we are required to appear for examination before the ICAC for any alleged failure to comply with section 22 of the ICAC Act.*

42. Perhaps the most significant group of complaints I received in 2020-2021, not so much because the objective merit of the complaints, but because of what they suggested about the internal functioning of the OICAC, was from four employees of the Investigations Unit of the OICAC. Although their names have been revealed publicly since the complaints were made and determined, I will refer to them as Complainants H, I, J, and K. The first complaint was made anonymously to me on 9 March 2021 by Complainant H who subsequently identified herself to me. Similar issues were raised later by the remaining members of this group of complainants. Complainant H's complaint raised two issues, first, an allegation of conflict of interest in the relationship between the Director of Investigations, Ms Kate Kelly and an external investigator contracted by the OICAC to carry out investigation work on its behalf, Mr David McGinlay. The second area of complaint seemed to me to raise employment issues, including allegations of bullying and intimidation. In accordance with the practice outlined above, I referred so much of the complaints as involved the employment issues to the Commissioner for Public Employment, who subsequently dealt with them. I retained for investigation and determination the allegation of conflict of interest. I dealt with that complaint by a Report pursuant to section 140(3) of the ICAC Act to the Chief Minister on 24 June 2021, which I understand to have been subsequently tabled in the Legislative Assembly. As that Report is now a public document and may be referred to by anyone who wishes to do so, it is unnecessary to quote from it extensively. My conclusion was in the following terms:

*It appears to me that the retention of Mr McGinlay as an external contractor was managed appropriately to avoid any conflict of interest. On the evidence I have examined, Ms Kelly had neither any role nor any influence in the selection of Mr McGinlay as an external contractor to the OICAC. Further, it is obvious that the potential for conflict was recognised at the appropriate time and managed appropriately.*

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

*I should add that it is obvious that Mr Gallagher, who was relevantly independent of the OICAC, determined that Mr McGinlay was the best of all the candidates. It will be very unfortunate if the OICAC was deprived of the services of the best person because of the existence of a personal relationship with an OICAC employee when that conflict could be appropriately dealt with as it was here.*

*In my opinion, based on the materials I have reviewed, the conflict of interest, if any, was appropriately managed and dealt with. Accordingly, I propose to dismiss the complaint.*

This issue will not arise again, at least not in the same way, because the incoming Commissioner, Mr Riches, has informed me that he does not propose to engage external investigators in future but to carry out all OICAC investigative functions in-house.

43. Complainant L was Mr Ian Rowbottam, a supervising prosecutor in the Office of the Director of Public Prosecutions. He, too, raised issues concerning Ms Kelly and Mr McGinlay. I include the materials in this report, not so much because of the substance of the complaint, which are regarded as having no basis, but rather because it provides illustration of the correct approach to the “whistle blower” provisions of the ICAC Act. Not every person who makes a disclosure or a complaint to the Inspector or indeed any other person authorised to receive such disclosures or complaints is entitled to “whistle-blower” protection. The legislation imposes criteria which must be satisfied before such protection is applicable. One such is that there must be “reasonable grounds” for the belief that improper conduct has occurred. Thus section 93(1) of the ICAC Act defines “protected communication” but subject to section 93(2) which provides:

*For subsection (1)(b), the information is information **the individual believes on reasonable grounds:***

*(a) would tend to show that improper conduct has occurred, is occurring or is at risk of occurring; or*

*(b) would assist the ICAC to perform the ICAC's functions; or*

*(c) would otherwise assist in the administration, or achieving the objects, of this Act. (my emphasis)*

Mr Rowbottam’s complaint was dated 15 June 2021 and was in the following terms:

*I wish to make a complaint against a current employee of ICAC, Ms Kate Kelly and her partner, Mr David McGinlay, former DPP Summary Prosecutor.*

*Mr McGinlay was employed by the office of the Director of Public Prosecutions from 18 March 2019 to 5 April 2019. Despite apparently having no Practising Certificate in the Northern Territory or elsewhere he was employed as a P2 Summary Prosecutor and appeared in the Darwin Local Court as a legal practitioner. He did so in breach of section 18(1) of the Legal Profession Act 2006.*

*Mr McGinlay is the partner of Ms Kelly and has been for many years. At all relevant times during Mr McGinlay’s employment with the DPP, Ms Kelly too was also employed in an identical role, on the same floor and as part of the same team. Indeed often they would appear in the same Court, Court 1 at the Darwin Local Court, together and beside each other at the Bar Table.*

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

*It is unimaginable [sic] that Ms Kelly did not know her own partner did not hold a practising certificate and indeed had never held a practising certificate here or in S.A. where he'd obtained his degree.*

*Ms Kelly had a duty under the Independent Commissioner Against Corruption Act 2017, (the very Act she now works under) and the Mandatory Reporting Directions and Guidelines to report to inform the DPP and her supervisors and the ICAC that McGinlay did not hold a practising certificate. She did not do so.*

*I have attached PDFs of all of the email information I possess in relation to this matter. It is self-explanatory.*

I dealt with this complaint on 30 June 2021 in the following terms:

*I acknowledge receipt of your email dated 15 June 2021 in which you raise concerns that Mr David McGinlay appeared in the Darwin Local Court as a legal practitioner in breach of the Legal Profession Act 2006 because he did not hold a practising certificate in the Northern Territory and that his partner, Kate Kelly, who was then employed in the same office failed to report that fact.*

*I am prepared to assume that Mr McGinlay's conduct in so appearing would be wrongful if your allegations are true. I am unable, however, to see that there is any breach of the Independent Commissioner against Corruption Act of the Northern Territory even making that assumption. Ms Kelly was not, at the time, an employee of the Office of the Independent Commissioner against Corruption and, in any event, I am unable to see how any of the mandatory reporting obligations of the legislation were triggered. Further, I do not believe that any reasonable person would consider that the legislation imposes an obligation on a wife or domestic partner to report her husband or domestic partner for a matter such as this.*

*I should add that you provide no evidence that Ms Kelly was aware that Mr McGinlay was appearing without a practising certificate and I do not accept your assertion that it is "unimaginable" that she was unaware of that fact.*

*Accordingly, I propose to take no action in relation to your complaint. I propose to provide a copy of this email to the Office of the Independent Commissioner against Corruption.*

The complainant responded to me on 1 July 2021 in the following terms:

*Sorry for the brevity of my reply but would you at least allow me to reply as to whether you should disclose my complaint to ICAC given the continuing employment of Ms Kelly and the current well publicised Police investigation of Mr McGinlay's apparent intimidation of the Manager of DCLS?*

*I can only say the disclosure of my complaint as even a potential whistle-blower is not something I, or my employers, had anticipated.*

I replied on the same date:

*I have already passed on to the Office of the Independent Commissioner Against Corruption my determination of your complaint. I thought it important and an exercise of procedural fairness that the agency about which you were complaining should know of your complaint and my determination thereof.*

*I note that you did not suggest in your complaint to me that you were entitled to any form of whistle-blower protection. I do not myself believe that you are entitled to such protection because it does not appear to me that you could be classified as a "whistle-blower", nor your communication to*



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

*me as a "protected communication" within the meaning of Part 6 of the Independent Commissioner Against Corruption Act 2017. The principal reason for that conclusion is found in section 93(2) of the Act. Specifically, I do not believe that you could have believed "on reasonable grounds" that improper conduct had occurred.*

*I propose to provide a copy of this email to the OICAC.*

I should add that the enquiries I made of the OICAC, and the information supplied to me by it established that Mr McGinlay was appropriately qualified and held a practising certificate. The complaint, therefore, appeared to have no basis in fact.

44. In addition to the complaints considered above, I received either shortly before or shortly after 30 June 2021 several other complaints, some of which I dealt with after 1 July 2021 and dismissed. I will report on them in the Annual Report for the year 2021-2022. There are a number of other complaints which I have deferred dealing with because the issues which give rise to them are the subject of litigation in the Northern Territory Supreme Court. It is not appropriate that I express views about matters that are the subject of pending legal proceedings. These include the complaints I have received arising out of the Commissioner's investigation into the circumstances surrounding the grant for construction of the grandstand at the Darwin Turf Club, as to which three separate proceedings have been commenced after 30 June 2021. There are others which I am in the process of concluding and may deal with by special report pursuant to section 140(3) of the ICAC Act. One such is a complaint I have received from News Limited. I anticipate concluding these outstanding matters soon.
45. Finally, in relation to complaints concerning the OICAC or in this case the former Commissioner, I note that Mr Fleming appeared before the Estimates Committee of the Legislative Assembly on 15 June 2021. That appearance generated some controversy including allegations that Mr Fleming had inappropriately named a whistle-blower. Mr Fleming himself reported the matter to me by email dated 24 June 2021. By that time, I had received an enquiry from a journalist from the Northern Territory News querying several of the matters raised by Mr Fleming during his evidence. I replied in the following terms:

*The evidence you quote and which was given by the Commissioner to the Estimates Committee of the Northern Territory Legislative Assembly yesterday Tuesday, 15 June 2021 is the subject of Parliamentary privilege which is of course an absolute privilege. As a consequence, I have no power to investigate what the Commissioner said and any attempt on my part to do so might well be a contempt of the Legislative Assembly. Such matters can only be considered by the Legislative Assembly itself and its Privileges Committee.*

This email states my view as to the correct position—my powers are limited by those of the Assembly.

46. It will be noted that I have not upheld any of the complaints against the OICAC that I have determined in the 2020-2021 financial year.

## 7. EVALUATION OF THE PERFORMANCE OF THE ICAC AND THE OFFICE OF THE ICAC

47. This is the second Annual Report that I have prepared since my appointment as Inspector and since the OICAC became fully operational. I prepared in 2019 a Preliminary Report at a time when the OICAC was still substantially in start-up mode. Anyone who wishes may refer to my 2019 Preliminary Report and my 2020 Annual Report to understand the situation of the OICAC at the time in question. Of necessity, a report like this is retrospective, looking back, as it does, to the past financial year. Here, the new Commissioner, Mr Riches, took office very soon after 1 July 2021. In a small agency, the impact of a new person at the top is likely to be substantial. Thus, while unavoidable, many of my observations about the operation of the OICAC may turn out not to be particularly relevant given the changes in approach that are likely to occur in such circumstances.
48. The OICAC has provided me with its Draft Annual Report for the 2020-2021 financial year on 15 September 2021. I will not repeat or attempt to summarise the Annual Report - it is, or will be, publicly available by the time I present my report. In connection with the point made in the preceding paragraph I note the following passage from Mr Riches' Commissioner's Foreword to the 2020-2021 OICAC Annual Report, with which I express my agreement:

*Those who engage in serious improper conduct are a scourge to public administration. Not only can significant economic harm arise, but an individual's improper actions can erode public confidence in an agency and destroy trust, confidence and morale within that agency.*

*The actions of the few can have a significant negative impact upon the vast majority of public officers who go about the duties with diligence and integrity.*

*Individuals who choose to abuse their power and breach the trust invested in them have no place in public administration. They ought to be held to account. Public bodies must ensure that their systems and processes guard against the risks of impropriety. Public leaders have a key role to play. Failing to ensure adherence to proper process, turning a blind eye to wrongdoing or failing to effectively manage obvious risks ought not be tolerated.*

*Maintaining integrity in public institutions requires a commitment from every public officer to act appropriately and to take seriously the powers and duties given to them.*

49. I note also the following passage in which the Commissioner sets out the matters upon which he wishes the OICAC to focus under his leadership:

*As the new Commissioner, my focus will be four-fold.*

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

*First, I will continue to build the organisation's capability and capacity. I am pleased with the solid foundation already established and the commitment and enthusiasm of my staff. We will continue to refine our skills, expertise and capacity, all of which are necessary to be an effective and efficient integrity agency. Professionalism, fairness, expertise, integrity and independence will be hallmarks of this office.*

*Second, I will focus my investigation activities on what I consider to be the most serious or significant allegations of improper conduct. I think that is what the public expects me to do. Corrupt conduct and serious anti-democratic conduct will be my focus. I do not intend to investigate misconduct or unsatisfactory conduct except in exceptional circumstances. We will conduct fewer investigations at any one time in order to focus resources and bring about more timely conclusions.*

*Third, my office will expand the manner in which it engages and supports public bodies to improve integrity within their institutions. While investigations into improper conduct will remain a central and important part of our work, of equal importance will be our role in prevention and education. That will be achieved through better analysis of our intelligence to identify trends, issues and hotspots, and to share information of relevance with agencies. So too will we support agencies (through education programs, audits, reviews and other prevention activities) to better identify integrity risks and the solutions to those risks. We will also support agencies to review and improve the protections afforded to whistle-blowers.*

*Finally, to the extent that I am permitted to bring to the attention of the Parliament, and the public, issues pertaining to integrity in public administration, I am committed to doing so. It is important for the Parliament, and for the public, to understand my office's activities, and the issues that might affect public integrity. Many integrity risks are common throughout public institutions. It is important that issues identified and lessons learned are shared broadly to maximise their impact.*

50. The Office of the ICAC has five operational units under the Commissioner and the Deputy Chief Executive Officer. Those units are:

- Prevention and Engagement
- Assessments
- Investigations
- Legal
- Corporate Services

51. The functions of each of these units are as follows:

- The Prevention and Engagement unit deals generally with the education and prevention of corrupt conduct function. It develops prevention and communication strategies and works with public bodies to implement tactics that, for example, foster a culture of reporting of potential corrupt conduct across agencies. My strong view is that the function of corruption prevention through education is of at least equal significance to the investigation function. Obviously, it is better that corruption is prevented rather than occurring and being later detected.

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

- The Assessments unit, as its name suggests, has the function of reviewing all complaints and reports which come into the Office of the ICAC to determine their eligibility for investigation by the Office. It applies the criteria established by the ICAC Act and makes recommendations to the Commissioner based on an assessment of whether the conduct in question is serious, systemic, sensitive and whether it is reasonably contemporary as opposed to historic. In addition, the unit deals with or oversees referrals to other agencies and monitors the implementation of any recommendations made by the OICAC.
  - The Investigations unit, once again as the name suggests, carries out the Office of the ICAC's investigation function. Its remit is to investigate the most serious, systemic, sensitive and contemporary allegations of improper conduct. It has a wide range of legislative powers to collect evidence, such as taking statements, gathering documents, coercive examinations and collecting information using traditional and contemporary investigative techniques.
  - The Legal unit was created in August 2020 with the appointment of In-house Legal Counsel. This position assists the Commissioner in performing the principal functions of prevention, detection, and investigation of improper conduct, and the protection of whistle-blowers. The in-house Legal Counsel advises the Commissioner and OICAC staff on the interpretation and application of the ICAC Act and other relevant legislation. All notices and directions issued under the ICAC Act are reviewed by the in-house Legal Counsel to ensure the scope and purpose are within power. The position also reviews and consults on policy and legislative reform, considering the potential for impact on operations of the OICAC. The role also appears as Counsel Assisting the Commissioner or Deputy Commissioner in examinations and works with the Investigations unit to prepare for the matters requiring examinations
  - The Corporate Services unit supports the operational requirements of the OICAC by managing finance, human resources, governance risk and business services.
52. As at 30 June 2021, the OICAC had 31 full-time equivalent employees, an increase from 22 FTEs a year ago and 12 a year before that. It had an operational budget of \$7.47 million for 2020-2021 an increase from \$5.6 million for the 2019-2020 financial year.
53. I note that the OICAC adopted a Strategic Plan setting out its vision for the period 2020-2023. I note the following matters about the Strategic Plan;
- It expresses the vision of the OICAC as a prosperous corruption-free Territory and its mission as one to support and empower Territorians to prevent, detect and respond to improper conduct.

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

- The aims expressed are to reduce improper conduct, demonstrate accountability, strengthen confidence in OICAC and public administration and build organisational capabilities and capacity.
- The expression of values such as integrity, courage, accountability and collaboration.

I also note that the Strategic Plan expressed the OICAC's areas of focus for 2021 in the following terms:

- Continue to safeguard the identity of protected persons (whistle-blowers) and security of information.
- Conduct comprehensive environmental analysis to determine corruption risks and hotspots.
- Refine our High Performance Framework and internal processes with a focus on maximising delivery functional objectives.
- Ensure a fit-for-purpose agency in relation to legislative and policy reform and human capital growth.
- Implement a strategy to foster a proactive reporting culture and coordinate responses to improper conduct.
- Continue to improve access to OICAC services for all Territorians.

I evaluate the OICAC's performance in these respects as satisfactory.

54. I evaluate these arrangements as satisfactory.

## 8. PUBLIC AND PUBLIC SERVICE EDUCATION

55. 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.

56. 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.

## 9. COMPLAINTS AND COMPLAINT ASSESSMENTS

57. In 2020-2021 the OICAC received 369 reports (containing 472 allegations) 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. 641

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

allegations were assessed in the period, comprising 380 of the 472 allegations received during 2020-2021 and 261 allegations received before 1 July 2020. I note that of those 641 allegations assessed, the outcome was 462 no further action, 64, preliminary enquiry, 45 refer to other agencies or bodies, 66 to be investigated and 4 for audit and review.

58. I am satisfied that the assessment process and the procedures established to deal with the reports are appropriate, as are the operations of the Assessment Unit.
59. In summary, my evaluation of these matters is that the Office of the ICAC is dealing with them in a satisfactory manner. In relation to the reports referred to in the preceding paragraph I evaluate them as extremely satisfactory.

## 10. INVESTIGATIONS

60. I note the following passage from the OICAC draft 2020-2021 Annual Report:

*The unit had eight FTE staff at 30 June 2021:*

- Director, Investigations
- Manager, Investigations x 2
- Senior Investigator x 3
- Senior Intelligence Officer
- Investigation Support Officer.

*In 2020–21, the OICAC invested significantly in improving the capability of our staff with specialist investigation training. It covered contemporary investigative techniques, maintaining an ‘investigative mindset’, and unconscious bias and its impact on decision making.*

*The unit continued to transition from a reactive to a proactive investigation approach during 2020–21. The team reviewed all current investigation matters in line with the office’s strategic plan and its legislative obligation to focus on the most serious, systemic and sensitive matters.*

61. I note, also from the draft Annual Report that in the period 1 July 2020-30 June 2021, this unit commenced 14 investigations, most of which involved more than one allegation of improper conduct. The investigations in question involved allegations of abuse of office-dishonesty (section 80, *Criminal Code Act 1995*), mismanagement of financial resources, abuse of office-arbitrary and prejudicial conduct (section 81, *Criminal Code Act*), misappropriation of public resources, maladministration of grant funding, criminal deception (section 227, *Criminal Code Act*), misuse of publicly supplied telecommunications devices and disclosure of confidential information (section 76, *Criminal Code Act*). As at 30 June 2021, 27 investigations had been finalised and 57 were ongoing. In the reporting period 51 witnesses attend an examination before the Commissioner or Deputy

Commissioners. As a result of such investigations, the OICAC made three referrals to the DPP and to Northern Territory Police and five public reports were published. I note OICAC considers there are several other significant outcomes from investigations, as follows:

- findings of corrupt conduct, misconduct, unsatisfactory conduct and breach of public trust;
- recommendations made to public bodies in relation to their policies and processes in circumstances where the evidence fell short of improper conduct by individuals but there were policy and governance issues that might lead to improper conduct occurring if not rectified;
- five matters that were subject to significant investigation effort and subsequent report and findings absolve persons of interest of any wrongdoing.

## 11. SOME QUALIFICATIONS

62. It should be apparent from what I have written above that I evaluate the manner in which the OICAC performed its significant public functions in the financial year 2020-2021 as generally satisfactory. Two matters, however, have caused me concern. The first is that whether, despite the fact that both the Commissioner for Public Employment and myself dismissed the complaints in question, the fact that so large a proportion of the OICAC employees in the Investigations Unit made the complaints referred to in paragraph 42 above, there might be some systemic issue which led to their evident dissatisfaction and ultimately, as must be obvious given the number of employees in question, to impairment of the effective functioning of that Unit. I have made enquiries of the Deputy Chief Executive Officer and have satisfied myself that there is unlikely to be a systemic issue and that all past and present employees had been and are managed appropriately and in accordance with best practice. Nevertheless, I propose to monitor this aspect of the OICAC's operations to ensure that that is the case and remains so.
63. The other matter which has caused me real concern and as to which I do not regard the OICAC's performance as wholly satisfactory arises out of an investigation carried out by the OICAC into issues surrounding a particular Darwin City Council procurement issue. On 25 May 2021 the OICAC released a Public Statement entitled *Investigation into a City of Darwin Procurement-Thrive Public Arts Project*. That Statement contained the following passage:

*On the balance of probabilities there is evidence of corrupt conduct by Ms X, as defined by sections 10(2)(c)(ii) and (vi) of the ICAC Act in that:*

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

- *Ms X failed to manage an actual or perceived conflict of interest in relation to the application by Ms Y for the position of THRIVE Project Manager.*
- *Ms X engaged in conduct that adversely affected the honest, impartial or effective performance of official functions by a public body.*

*Ms X worked directly with Ms Y during the development of the THRIVE project and requested Ms Y contribute to drafting the EOI scope for the THRIVE Project Manager position. Ms X did not declare or manage a conflict of interest at the time Ms Y made the application for the consultancy.*

*Ms Y had a detailed knowledge of the THRIVE project as the person who had conceived and developed it. She did not declare a conflict of interest at the time she submitted an EOI for the Project Manager consultancy contract.*

*Ms X failed to manage the assessment of the EOI submitted by Ms Y against the EOI criteria, and appointed Ms Y to the position in breach of City of Darwin procurement protocols requiring authorisation by the CEO.*

*There is insufficient evidence on the balance of probabilities that Ms X and Ms Y together drafted the scope for the EOI to limit interest in the position by imposing requirements that were not reasonable or necessary for the role.*

*A strong warning to all public officers should be taken from this because the ultimate consequence for Ms X was termination of her employment.*

It will be seen at once that these findings are serious. It is partly for that reason but also because of what followed that I have anonymized the names of the two persons against whom such findings were made in the passage quoted.

64. Unfortunately, it turned out that there had been a denial of procedural fairness and it was necessary to withdraw the Public Statement and the findings it contained. What had occurred was this: on 14 May 2021 Ms X had provided a response to a draft of the findings but unfortunately that response was filtered out by the Northern Territory Government's automated security systems and placed into a 'junk' email folder. Consequently, the OICAC was not aware of Ms X's response and did not include it in the Investigation Report or Public Statement. This was, at least arguably, a breach of section 50(2) of the ICAC Act which provides that "*if the ICAC proposes to make an adverse finding about a person or body in an investigative report, the ICAC must give the person or body a reasonable opportunity to respond to the adverse material and include a fair representation of the response in the report*".
65. The Commissioner issued a statement on 25 May 2021 and a further statement in the following terms on 26 May 2021:

*I released a report yesterday into a procurement matter at the City of Darwin.*

*I apologise unconditionally to the two people named who have been denied natural justice.*

*There were two issues with the report relating to natural justice for two people named in the report.*



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

*The first issue related to the receipt of a document from one person. The document was a response to the process of natural justice.*

*The Northern Territory Government has filters in respect of material received via email. The document from the person was filtered out and placed into the 'junk' email folder because it contained filterable material. My office did not review the junk email folder and so the email was not detected.*

*Consequently, the person did not receive the natural justice dictated by section 50 of the Independent Commissioner Against Corruption Act 2017 ("the ICAC Act").*

*The second person had no finding of improper conduct made in the report, in the sense that there were no findings of corrupt conduct, misconduct or unsatisfactory conduct in terms of the ICAC Act. However, I accept that some comments in the findings may be considered to be adverse to the person.*

*These failings I deeply regret. Consequently:*

- I have now taken down all sources of the report from the Office of the Independent Commissioner Against Corruption website;*
- I retract all findings that have been made adverse to those people's right to natural justice;*
- In order to limit any further comment about each person I request that there be no further public reference to the findings in the report.*

*I have directed that, immediately, three things happen:*

- First, all junk mail folders be regularly cleared to ensure this will not happen again.*
- Second, before a report is released, any person the subject of adverse comment will be followed up about their responses if any, to ensure that the process is complete.*
- Third, before a report is released, it will be checked, again, to ensure that each and every adverse finding has been included in the natural justice process, and no finding is omitted from that process.*

*I intend to do two further things immediately:*

- First, I will take independent legal advice on the matter.*
- Second, I will report the non-compliance to the Inspector under Part 7 Division 4 of the ICAC Act.*

66. As he said he would in the Statement quoted in the preceding paragraph, the Commissioner Reported the matter to me on 27 May 2021.

67. I have considered the issues which arise from the circumstances set out in paragraph 63-66 above. I accept that what occurred was a result of an unfortunate accident, that is, the interception of Ms X's email by the Northern Territory Government junk email filters. I also consider that the response of the Commissioner and the OICAC on learning of the error was entirely appropriate. That said, Ms X was represented by a law firm and thought might well be given to contacting that law firm, prior to issue of the Public Statement, to determine whether Ms X did, in fact, wish to make a response or

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

submissions in relation to the findings propose to be made against her. If that had been done, the probabilities are that Ms X's early response would have come to light. I hope in future steps like that will be taken.

68. What was of most concern to me about these events was the possibility that there may have been, albeit innocently, a waste of resources of the OICAC. Inevitably, there must have been such to some extent at least. I am pleased to report, however, that the OICAC has dealt directly with the Darwin City Council which has acknowledged the vulnerabilities in its processes identified by the investigation and is currently engaged with the City of Darwin regarding opportunities to deliver training related to integrity matters.
69. I propose to monitor these matters as well.

## 12. CONCLUSION

70. I am satisfied that the Office of the ICAC, the Commissioner himself and his staff have acted within power and in compliance with the Act and other relevant legislation and I evaluate the performance of the OICAC overall as satisfactory.



Bruce McClintock

Inspector ICAC