

The ICAC and HR Implications for Public Bodies

FACT SHEET

The Territory Government is creating an Independent Commissioner Against Corruption (ICAC) to investigate government corruption, and restore integrity and transparency to Government. Legislation has been drafted and will be introduced into the Legislative Assembly this year. The Government is currently seeking feedback on the draft Bill, which is available at www.justice.nt.gov.au. This fact sheet is intended to assist you to provide an informed response.

What is the ICAC?

The ICAC is a specialist investigator with a focus on government corruption. It investigates certain kinds of criminal offences that relate to government corruption, but also can investigate serious breaches of public trust that are not technically offences. In addition to the kinds of powers Police have, the ICAC has powers to enter government premises without warrants, and to compel any person to attend and give evidence. The ICAC will also administer a whistleblower protection scheme, which will allow it to protect important sources of information.

If a person is employed or engaged by a public body, they can be investigated by the ICAC

The definition of public body in the Bill is broad, encompassing not only Government Agencies, but statutory authorities, local government councils, contract service providers to other public bodies, and bodies that receive government grants. Any person who is a member, employee, officer, or otherwise engaged by public body is a public officer, and can be investigated by the ICAC with respect to carrying out the functions they are performing for government (or government money they are spending).

Public officers will need to consider whether they should report matters to the ICAC

The ICAC Bill requires the ICAC to create a **mandatory reporting** scheme for public officers to report improper conduct. The exact nature of the reporting obligations and the matters required to be reported will be determined by the ICAC, as different reporting obligations may be appropriate for different workplaces and different levels of seniority (although limited to matters which are 'improper conduct' as defined by the Bill). There will be no criminal penalties for failure to comply with the mandatory reporting scheme, but it may lead to adverse comment by the ICAC to the public body, and adverse comment about the public body in an audit.

Whether or not a matter must be reported under the mandatory scheme, public officers are encouraged to report improper conduct under the whistleblower protection scheme. Part 6 of the Bill details the whistleblower protection scheme, which will replace the existing scheme in the *Public Interest Disclosure Act*. Public officers should be advised that to qualify for protection, a matter must be reported to one of a number of persons or bodies defined in clause 90 of the Bill. This is called making a **protected communication**.

A person cannot be civilly or criminally liable, or liable to disciplinary action for making a protected communication. However, reporting their own improper conduct does not prevent them from being prosecuted or disciplined for that improper conduct.

Any person can make a protected communication. They do not have to be a public officer.

How whistleblower protection relates to other employment laws

It is an offence to commit **retaliation** against a whistleblower. Retaliation means causing or threatening a person with harm for making a protected communication or to deter them from making a protected communication. The definition of harm is broad, including not only physical and mental harm, but intimidation, harassment, and adverse treatment in relation to employment, career, profession, trade or business.

This means that a whistleblower who suffers retaliation in the workplace may be able to choose between fair work proceedings and bringing a claim for compensation for retaliation under the ICAC Bill, and should seek legal advice on the comparative merits of these two alternative actions. There have been technical changes to the procedures involved in making a claim for compensation for retaliation which facilitate better access to justice. These include limits on legal costs that can be awarded against a whistleblower, the ability to lodge a claim in the Local Court or NT Civil and Administrative Tribunal, and provisions which require the courts to consider suppression of the whistleblower's identity. This reflects research which shows that keeping a whistleblower's identity confidential is often the best protection, a principle which has been enshrined in the Bill (at clause 88).

Rights and responsibilities of whistleblowers

When a person makes a protected communication, they are now required to be informed of the matters listed at clause 95 and Schedule 2 of the Bill. While the tools for protecting whistleblowers have been strengthened compared to the *Public Interest Disclosure Act*, there are also responsibilities on whistleblowers to take reasonable steps to seek assistance if they experience or fear retaliation, and to consider accessing support services. Failure to take reasonable steps may impact the amount of damages that can be claimed in a compensation claim.

Whistleblowers need to be aware that they are not immune from disciplinary action because they are whistleblowers. An employee who is performing poorly or who breaches the code of conduct can suffer adverse employment action for those reasons.

Rights and responsibilities of managers

Managers need to be aware that they can take disciplinary action against an employee who is a whistleblower, but if the manager is prosecuted for retaliation, the onus will be on them to demonstrate that the disciplinary action was not taken for reasons other than retaliation. Managers need only prove a subjective belief they were taking reasonable action, but this represents a shifting of the onus from the whistleblower to the manager to prove what was going on inside the manager's head when the action was taken.

Proactive tools for protecting whistleblowers

Under the new scheme, the ICAC will be able to direct public bodies to take action to protect persons from retaliation. If the public body wishes to challenge the direction, they can apply to the Supreme Court, but the resulting procedure has protections that allow the court to hear information about the whistleblower's identity and the person's need for protection in the absence of the public body. A whistleblower themselves can still seek an injunction or interim injunction to stop anticipated retaliation.

The new Bill generally places an obligation on public bodies to take active steps to develop policies, procedures, and training for reporting corruption and protecting whistleblowers. The ICAC issues guidelines and directions on best practice measures, and audit and report on the compliance of public bodies with these measures. The Bill makes the steps taken by the body in relation to policies and training to prevent retaliation relevant to the amount of compensation a public body would pay in a claim of retaliation in the workplace.