

**SUMMARY OF KEY ISSUES ARISING FROM CONSULTATIONS ON  
INDEPENDENT COMMISSIONER AGAINST CORRUPTION EXPOSURE DRAFT BILL**

**September 2017**

The majority of the amendments made to the draft Bill prior to Introduction in the Legislative Assembly were technical in nature, but where issues of policy were raised during public consultation, the following table sets out what those issues were and how the Government has responded.

Issue	Response
Whether the ICAC's powers to investigate 'private' public bodies, such as contract service providers and grant recipients, is suitably defined and limited.	The Bill has been amended to further clarify relevant definitions and powers to ensure the ICAC's powers to investigate 'private' public bodies are limited to the ways in which those bodies are performing government functions or spending taxpayer dollars. The exposure draft included provisions that would have allowed the ICAC to access any contract service provider's legal advice, and enter the premises of any grant recipient without a warrant. Such powers would be unusual, even for an anti-corruption body and the ICAC's powers were not intended to extend so far. Consequently, amendments have been made so the ICAC's powers over 'private' public bodies do not extend so far.
Whether the provisions entitling a person to legal representation and/or an interpreter were appropriate.	The Bill has been amended to strengthen rights to legal representation and an interpreter. The ICAC is now obliged to source and pay for an interpreter where one is needed. Legal representation can now only be refused in certain, specified circumstances, mirroring more closely the provision in s 127 of the <i>Independent Broad-Based Anti-Corruption Act 2011</i> (Vic), which the Martin Report endorsed as a suitable provision.
Why elected officials had been excluded from the test of corrupt conduct at s 10(2).	The wording of s 10(2) caused some people to mistakenly believe that elected officials were being given a different test to allow them to escape the operation of the ICAC. In fact, the reason they were excluded from s 10(2) was that the test was largely inapplicable to an elected officer, given that the circumstances in which an elected officer can be 'terminated' are minimal. Hence, s 10(3) provided a test that would bring elected officer's under the ICAC's jurisdiction for roughly equivalent conduct to that defined by s 10(2). In order to prevent confusion, s 10(2) has been amended to remove the words that excluded elected officers. This amendment has been made to remove a distraction that was being misunderstood, but in practical terms the amendment does little, as s 10(2) would so rarely apply to an elected official in any event.
Whether the ICAC would have adequate powers and independence.	Most stakeholders were satisfied that the Bill gave the ICAC adequate powers and independence, although many remain sceptical about the implementation. Queries have been raised as to whether the selection panel that selects the ICAC should include at least one person without ties to the Territory, such as a judicial officer or former judicial officer who has not previously lived or worked in the Territory. Some stakeholders

	are generally sceptical that anyone selected to be the ICAC could be or would remain independent.
Whether the selection process for the ICAC will be appropriate.	Suggestions were made with respect to the selection process for the ICAC. Such suggestions are welcome and have been noted, however they are a matter for the implementation of the Bill rather than suggestions that would conflict with the provisions of the Bill as drafted. The Bill itself provides strict eligibility criteria for the ICAC and a process that involves public scrutiny of the proposed appointee via the Legislative Assembly.
Whether the ICAC could look at Land Councils.	Land Councils are entities created under Commonwealth legislation and so are not generally bodies the ICAC would be able to investigate. It may be possible that the ICAC can investigate a Land Council to the extent it has a contract or funding from the NTG. It would not be appropriate for the NT ICAC to generally investigate Commonwealth entities.
Whether the ICAC should have the power to prosecute	This was raised during an interview on ABC radio by a NSW ICAC investigator and subsequently the source of further questions. It is contrary to the Recommendations of the Martin Report, and there is no compelling need for the ICAC to conduct its own prosecutions. This did not seem to be a widespread concern, and was not a concern expressed in submissions by any investigation, law enforcement, or criminal law-related bodies.
Require that whistleblowers are notified of receipt of a referral and of the outcome of any resulting investigation.	An amendment has been made to ensure that the ICAC deals with these matters in the guidelines it issues for whistleblower protection. It is appropriate for the ICAC to determine what these requirements should be along with the other matters it specifies in the guidelines, rather than enshrining a rigid process in legislation.
Whether public bodies would be adequately resourced to respond to the disruption of an ICAC investigation, to carry out referred investigations, and to train staff to meet new requirements such as mandatory reporting and whistleblower protection obligations.	These are questions for implementation and do not require resolution prior to introduction of the Bill. The policy model adopted clearly requires mandatory reporting and a whistleblower protection regime.

### **Stakeholder Suggestions Not Adopted**

The following suggestions for amending the legislation were made during the public consultation process by individual stakeholders. These were considered but not adopted for the following reasons:

<b>Suggested amendment</b>	<b>Reason for not adopting</b>
Allow ICAC to audit court or judicial officer in relation to judicial functions.	Current provision preserves judicial independence and separation of powers. Courts can be investigated in relation to corruption in the performance of judicial functions, but this requires some evidentiary basis, as opposed to an audit, which can be conducted at random.

Broaden definition of 'university' to include any potential tertiary institution operating in the Territory.	No particular bodies were identified, but insofar as these bodies are extensions of the NT public sector, it is anticipated they will be included by the broad definitions of a 'public body'.
Allow ICAC to investigate 'anyone involved in tenders'.	Already covered. The ICAC has the ability to investigate all public officers involved in corruption, whether in relation to tenders or otherwise. It also has the ability to investigate collusive tendering for government contracts.
Allow a private business or individual who is cleared of wrongdoing by the ICAC to be awarded the costs of defending themselves.	Imposing such a duty on investigation bodies has been considered and rejected by the courts on many occasions. Concerns include that it would interfere with fearless investigation of criminal activity, it would sometimes lead to a conflict of duties, and it would involve the court interfering with an independent body's discretion to decide what to investigate and prioritise. Organisations and individuals doing business with government consider potential risks and liabilities involved in undertaking government work. The risk of an ICAC investigation is a minor, additional risk in the context of the risk of investigation by existing bodies or other liabilities.
Retain the Public Interest Disclosures Commissioner as a separate, additional body, tasked solely with protecting disclosures.	This is contrary to the Recommendations of the Martin Report and would have resourcing implications for the ICAC. While it is true that protecting a whistleblower may potentially conflict with exposing corruption through investigation and prosecution, this conflict would not be solved by having a separate body devoted to protecting the whistleblower. A choice would still have to be made by the investigation body between protecting the whistleblower and taking action to deal with corruption. If the ICAC is not also tasked with whistleblower protection, it may not give the needs of whistleblowers as much weight.
Retain the term 'public interest disclosure' rather than 'protected communication', which arguably suggests protection is guaranteed.	The term 'public interest disclosure' has been discontinued because it was not well understood. While protection is not guaranteed the term 'protected communication' sends a strong message to public bodies that the law requires whistleblowers to be protected.
Maintain legal professional privilege 'without limitation'.	The Bill maintains Legal Professional Privilege (also known as client legal privilege) as it currently exists in the Territory. For some time, the Territory has permitted organisations that investigate public bodies, such as the Ombudsman and the Public Interest Disclosure Commissioner, to look at the legal advice of those public bodies. This does not allow investigators to look at the legal advice of individual public officers, and does not allow the ICAC to further disclose the legal advice of public bodies unless that advice is evidence that is relied upon to show corruption. During development, these provisions were discussed with Solicitor for the Northern Territory, and no concerns were raised that the provisions would unduly impede the provision of appropriate legal advice to government. The continuation of the status quo regarding legal professional privilege is considered to strike the appropriate balance

	between protecting the Territory's legal interests and ensuring corruption can be exposed and dealt with.
Do not give the ICAC the power to declare communications to be protected communications, as this may deny persons protection.	This provision increases the protection of a whistleblower and allows proactive steps to be taken to protect a whistleblower at an early stage. This suggestion appeared to misinterpret the provision.
An Independent Police Complaints Commission should be established in addition to an ICAC.	This suggestion is beyond the scope of what this Bill is intended to provide. It would be difficult to justify in a small jurisdiction where the Ombudsman and the ICAC will already provide independent oversight of Police.
The ICAC should be staffed solely with persons from other jurisdictions, on rotation.	The ICAC's choice of staff should be a matter for the ICAC. There would be practical difficulties with a rigid requirement to only use staff from other jurisdictions.
The ICAC should have a role holding government accountable for its policy commitments.	This is a fundamentally different kind of body to an anti-corruption body, one that would involve a body that would be taking political views. There would be substantial risks in politicising the ICAC in this way, and substantial resourcing implications in adding this responsibility to the ICAC's functions.
There should be a process of seeking public comment on potential ICAC appointees.	An independent selection panel is anticipated to select the ICAC and will presumably use due diligence. The proposed appointee must also be approved by the Legislative Assembly, which is a public forum where the merits of the proposed appointee may be debated if necessary.
An ICAC should not be able to be a lawyer of 10 years standing as this will result in nepotistic appointments.	It does not seem to follow that this requirement is likely to lead to a nepotistic appointment. This eligibility requirement was recommended by the Martin Report and is similar to requirements for equivalent positions interstate.
Affected persons should be able to appeal ICAC decisions to the Inspector.	This process would interfere with the ICAC's independence. It would also greatly inflate the resources and role of the Inspector and is not practicable within the resources of a small jurisdiction.
All ICAC reports should be published.	ICAC reports can be published in appropriate circumstances. Some reports will contain private and sensitive information and carry a risk of prejudicing prosecutions if released. The Martin Report recommended that the default position be that ICAC investigations are conducted in private.
Include a specific offence of obstructing a whistleblower, as per clause 21 of the South Australian ICAC Act.	The Bill already provides a wide range of civil and criminal provisions to protect whistleblowers and to deter persons from obstructing a whistleblower.
Require ICAC to consider whether referring an allegation to a public body for investigation may adversely affect the performance or future performance of the public body.	The ICAC is already required to consider a broad range of factors, including the impact of its actions on public bodies carrying out their functions. There is no reason why this particular factor needs to be re-stated or elevated above the other public interest factors that may be relevant in a given case.
Create the ICAC as a 'branch' of an existing interstate ICAC.	The Government considered the suggestion in the Martin Report to directly appoint South Australian ICAC Commissioner, Bruce Lander, and rejected this submission. The Government prefers that the ICAC is a full time position

	based in the Territory, recruited through a merit-based selection process, able to solely focus on dealing with Territory corruption.
Exempt small businesses and community organisations from ICAC audits and investigations.	Given the ICAC focuses on serious improper conduct in the public sector, it is unlikely to be investigating a small, private business unless it has very serious concerns of public sector corruption. Where the ICAC has such concerns, it is justifiable for the ICAC to have all its powers, including audit powers, available to investigate the matter. While investigations do have resourcing implications, the intention of the Bill is to ensure there are no gaps as to who can be investigated for corruption.
Whether public bodies should be able to refuse to provide the ICAC with evidence which would reveal law enforcement methodology, such as Police intelligence or confidential correctional services information, similar to the matters identified by section 46 of the <i>Information Act</i> .	It is intended that the ICAC be able to investigate Police and Correctional Services. It is therefore not only appropriate but necessary that the ICAC be able to view any information regarding the conduct of Police and other public officers involved in law enforcement for the purposes of its investigations.