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Dear Mr Bradshaw

Re: Opposition Response to Invitation for Submission concerning the Independent Commissioner Against Corruption Bill 2017

For your review, attached please find the Northern Territory Opposition's Submission regarding the Exposure Draft of the *Independent Commissioner Against Corruption Bill 2017* (NT) (the Bill).

As outlined in the submission, the Opposition supports the formation of an Independent Commission Against Corruption (ICAC) in the Territory in line with the recommendations made by the Honourable Brian Martin AO QC in the May 2016 Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report (Martin Report).

However, the Bill departs from the Martin Report in some important respects, which the Opposition believes are unacceptable and need to be addressed. In particular, the Opposition favours: (1) the implementation of a protocol for the appointment of the ICAC Commissioner which ensures independence, impartiality and freedom from political influence of any kind; (2) the provision of funding that is sufficient to preclude political influence on ICAC; and (3) maintenance of the legal profession privilege without alteration, which is in the public interest.

If you require any additional information, please do not hesitate to contact me directly.

Yours sincerely

Gary Higgins
Leader of the Opposition
July 2017

Northern Territory Opposition

Submission Regarding the Exposure Draft of the Independent Commissioner Against Corruption Bill 2017

I. Overview

The Northern Territory Opposition supports the formation of an Independent Commission Against Corruption (ICAC) in the Territory. Indeed, it was the former CLP Government that commissioned the Honourable Brian Martin AO QC to prepare the Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report (Martin Report), which was handed down in May 2016.

However, the exposure draft of the *Independent Commissioner Against Corruption Bill 2017* (the Bill) unacceptably departs from the Martin Report in some significant respects. These departures will detrimentally affect the independence, viability and integrity of a Territory ICAC.

As the Martin Report stated quite succinctly, 'Getting it right from the outset is of critical importance ....'[1] The Opposition unreservedly agrees with this assessment and, therefore, urges the Government to fully and fairly implement the recommendations of the Martin Report, giving particular consideration to the following fundamental issues:

II. The independence and impartiality of the ICAC Commissioner must be guaranteed through an open and transparent appointment process

The Commissioner is the keystone of the ICAC and any perceived bias, predisposition or inclination on the part of the appointed Commissioner will foredoom the integrity of the entire enterprise. The absence of any process whatsoever for the appointment of the ICAC Commissioner in the consultation draft of the Bill is remarkable. Moreover, what has been related to the pubic concerning the ICAC Commissioner is concerning, such as the lack of a transparent and politically unbiased appointment process.

Surprisingly, the ICAC Bill does not provide a procedure for the appointment of the ICAC Commissioner. Instead, the ICAC Bill Exposure Draft Explanatory Materials provide a vague and imprecise description of what may take place. As the Exposure Explanatory Notes state:

[1] Hon Brian Martin AO QC, Submission to the Parliament of the Northern Territory, *Anti-Corruption, Integrity and Misconduct Inquiry: Final Report*, May 2016, 159 [302].

> It is anticipated that appointment of the ICAC will follow the same protocol as appointment of a judicial officer, where an appropriately qualified independent panel considers and puts forward a recommendation of a suitable candidate, which the majority of the Legislative Assembly must then approve.[2]

This unsatisfactory explanation of the appointment procedure, which is presented in supporting material to the Bill, is wholly insufficient to insulate the ICAC appointment process from the spectre of partisan politics. Indeed, the fact that the appointment process is framed in terms of an 'anticipated' procedure suggests that the Government may choose any procedure that it deems appropriate, perhaps even allowing the Attorney-General or Chief Minister alone to choose the ICAC Commissioner, which would be completely inappropriate.

Nonetheless, the current Territory *Protocol for judicial appointments and appointment as President or Deputy President of the Northern Territory Civil and Administrative Tribunal* (Judicial Appointments Protocol) subjugates the appointment process to the ultimate control of a political officer, the Attorney-General. Specifically, the Judicial Appointments Protocol requires a panel—made up of the Chief Justice, Solicitor-General and CEO of AGD—to recommend at least two 'persons suitable for appointment' to the Attorney-General. After consultation, the Attorney-General then makes a choice.[3] This procedure is acceptable when appointing a judicial officer, whose independence and impartiality is guaranteed by convention, statute[4] and the notional separation of powers doctrine.[5] No such surety is provided in the case of an ICAC charged primarily with investigating corruption and anti-democratic conduct in political and public office.[6]

The potential for a flawed appointment process to undermine the integrity and independence of the ICAC from the outset was well understood by the Martin Report, which stated:

> The Judicial Appointments Panel is required to recommend to the Attorney-General not less than two persons suitable for appointment as a Supreme Court

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[2] *Independent Commissioner Against Corruption Bill 2017* (NT), Exposure Explanatory Notes 57 [110].

[3] Northern Territory of Australia, *Protocol for judicial appointments and appointment as President or Deputy President of the Northern Territory Civil and Administrative Tribunal*, 2 [6] < http://www.supremecourt.nt.gov.au/documents/ReviewoftheProcessesfortheAppointmentofJudicialOfficersintheNorthernTerritory-Report.pdf>.

[4] See e.g. *Supreme Court Act* (NT) s 37. Compare, for example, the ICAC Commissioner oath of office requirement with that of a Supreme Court Judge. *Compare* ICAC Bill s 119 ('the ICAC must take an oath that the ICAC will faithfully, impartially and truly perform the functions of the ICAC according to law'); *with Supreme Court Act* sch 1 ('I, , *[promise/swear etc. as required by Oaths, Affidavits and Declarations Act]* that I will bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law, that I will well and truly serve Her in the Office of Chief Justice [or Judge] of the Supreme Court of the Northern Territory of Australia and that I will do right to all manner of people according to law without fear or favour, affection or ill will. *[So help me God! or as appropriate]*').

[5] If indeed such a doctrine applies to the Northern Territory. See *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41 at 18 [38] (French CJ, Kiefel and Bell JJ).

[6] *Independent Commissioner Against Corruption Bill 2017* (NT) s 16.

> Judge. In my view, **that requirement is not appropriate in respect of the appointment of an NT Commissioner**. Rather than making a recommendation to the Attorney-General, in respect of an NT Commissioner an Advisory Panel would make a recommendation to a bipartisan Standing Committee of the Assembly ....[7]

In addition to removing the Attorney-General from the selection process, the Martin Report also suggested that an unimpeachable person, without extensive ties to the Territory or any conceivable interest in any particular outcome be appointed as the first ICAC Commissioner. The person the Martin Report suggested for that role was the Hon Bruce Lander QC, whose independence could not be questioned and who also has extensive previous ICAC experience:

> The appointment of Mr Lander would assure both independence, and appearance of independence, from **the influence of familial and personal connections that often arise in the Territory**. This issue is a matter of concern that has been emphasised in a number of submissions. .... The importance and advantage of appointing a person possessing Mr Lander's qualifications, independence, experience and expertise should not be underestimated.[8]

In essence, the recommendation was that, in order to absolutely guarantee independence, a person from outside the Territory, without extensive ties to the community or the political system—whether that be Mr Lander or not—be appointed as the ICAC Commissioner.

Unfortunately, these suggestions apparently have not been followed by the Territory Government, either in spirit or in substance. This is despite a Territory Labor's submission to the Martin Inquiry advising that the ICAC should 'fall within the jurisdiction of the Supreme Court', assumedly to ensure independence.[9]

The lack of detail around the appointment process alone is extremely worrisome and simply utilising the existing Judicial Appointments Protocol will inescapably undermine the credibility of the ICAC, before a single matter is investigated.

Given the potential for an inadequate selection process to overshadow the entire ICAC framework, the Territory Government should implement a process for the selection of an ICAC Commissioner which is completely transparent and open, including the following components:

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[7] Martin Report, above n 1, 144 [271]-[272] (emphasis added).
[8] Martin Report, above n 1, 157 [294], [297].
[9] Martin Report, above n 1, 337.

1. **The initial selection process should take place in public, with a list of all interested parties provided for public evaluation, prior to any decision being made on the appropriate candidate.**
2. **The Attorney-General should play no part whatsoever in the initial selection process, nor should any other elected member of the Legislative Assembly.**
3. **The existing panel for judicial appointments (Chief Justice, Solicitor-General and CEO of the Department of Attorney-General and Justice) should be tasked with interviewing candidates.**
4. **The panel should then produce a single recommendation for the appointment of an ICAC Commissioner, identifying the 'nominee' and issuing a public statement supporting that decision.**
5. **The panel's recommendation should then proceed directly to the Legislative Assembly for the commencement of public committee hearings which allow each member of the Legislative Assembly to question the nominee in a public setting.**
6. **A vote of the Legislative Assembly should then be held to approve or disapprove of the selected nominee.**

The success or failure of an ICAC in the Territory will depend directly on the integrity and both perceived and real independence of the first ICAC Commissioner. Ignoring these recommendations will impede the public's confidence in the ICAC and ultimately diminish the credibility it is afforded.

The same is true with regard to the appointment of the Inspector, who has the responsibility of overseeing the activities of the ICAC. Section 131 of the ICAC Bill provides for the appointment of an Inspector by the Administrator, but—like the ICAC Commissioner provisions—fails to specify the procedure for the appointment of the Inspector.[10] For identical reasons to those discussed above, the appointment of the Inspector should not follow the Judicial Appointments Protocol, but the substituted process recommended above.

III. Sufficient funds must be dedicated to make the ICAC a success

Adequate funding commensurate with the administrative and substantive needs of the ICAC is essential to ensure independence and freedom from either perceived or real bias. If the ICAC Commissioner is routinely and perpetually required to seek additional funds from the Government of the day, the impartiality of the ICAC will be justifiably questioned. The conflict of interest that will arise from total financial reliance on the very public servants and politicians it is charged with investigating, will necessarily create the inverse of independence—complete and total dependence.

[10] *Independent Commissioner Against Corruption Bill 2017,* s 131(1).

This conflict of interest was considered very thoughtfully by the learned author of the Martin Report, which concluded that fostering a process which rendered the ICAC perpetually beholden to Government for funding was unacceptable. As the Martin Report recommended:

> [F]or the first two years the NT Anti-Corruption Commission should be given a discretion to exceed its budget if the circumstances require that it do so in order to carry out its role and to respond adequately to reports made to it. It might be appropriate to give the bipartisan committee which possesses oversight of the Commission a role in this regard.[11]

This recommendation has not been followed. The Labor Government has provided $3 million per year for the ICAC and it was stated during public consultation that, if that amount was not sufficient, the ICAC would be forced to petition the Government for a Treasurer's Advance.[12] This is precisely the lack of budgetary discretion that the Martin Report was so concerned with. Forcing the ICAC to seek favour with the Territory Government in order to covert its own expenses is an untenable position for statutory authority charged with investigating public corruption.

The unavoidable conflict of interest that will exist between the ICAC Commissioner and the Government is further exacerbated by the fact that the ICAC Commissioner will serve a dual role as CEO of the ICAC. Splitting the ICAC Commissioner role and the CEO of ICAC into two positions would have assisted in this respect. As was suggested by the Martin Report, a Deputy Commissioner or CEO of the ICAC would provide the ICAC Commissioner with the flexibility to delegate powers over various functions.[13] However, that recommendation was similarly rejected.

The idea that the ICAC may be underfunded from the outset is not fanciful. It is estimated that the actual cost of the ICAC will substantially eclipse the $3 million budget that has been provided by the Labor Government. According to the Martin Report, the actual cost will most likely exceed $5 million per year—over 40 per cent more than the budget provided by the Labor Government. However, the true cost could be much higher. For example, Queensland pays about $54 million for their ICAC and Western Australia spends over $31 million.[14] As the Martin Report wisely counselled:

> The initial cost of establishing the NT Anti-Corruption Commission will be substantial. … In addition to the initial outlay, investigations of the type likely to be

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[11] Martin Report, above n 1, 141 [255].
[12] See Lucy Hughes Jones, 'NT corruption watchdog in force by April', *The Daily Telegraph* (online), 28 June 2017 <http://www.dailytelegraph.com.au/news/breaking-news/nt-corruption-watchdog-in-force-by-april/news-story/b9964c583dbc034e3242aafbd758832e>.
[13] Martin Report, above n 1, 231 [492].
[14] Ibid. 79 [111].

> undertaken by the NT Anti-Corruption Commission will be expensive. Legal and financial investigators are not cheap. Nor are IT-based investigations. Either as permanent employees, or persons retained for specific tasks, the services of persons qualified to investigate electronic storage facilities such as computers, mobile telephones etc will also be expensive. A similar prediction can be made with respect to surveillance and listening device operations.[15]

For the reasons outlined above, underfunding the ICAC by 40 per cent or more—particularly in the critical first two years following its establishment—will fundamentally undermine the objectivity and impartiality of the office. At the very least, a perception of dependence will be created which will considerably detract for the integrity and public trust which should be the hallmark of Commission of this type.

IV. The Legal Professional Privilege should be maintained without limitation

Contrary to over 400 years of common law and the meritorious recommendations of the Martin Report, the Labor Government has seen fit to abrogate legal professional privilege for purposes of the ICAC.[16] Nullification of the legal professional privilege, in any form and for any purpose, is not only unwarranted, but represents a significant risk to 'an important human right deserving of special protection'.[17]

Legal professional privilege has been described by the High Court as a 'fundamental and general principle of the common law'.[18] At common law, legal professional privilege—or client legal privilege under the *Evidence (National Uniform Legislation) Act* (NT)—serves the interests of justice and the public at large by encouraging full and frank discussion and disclosure between lawyers and their clients.[19] As Gleeson CJ, Gaudron, Gummow and Hayne JJ held in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*:

> It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.
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[15] Ibid. 171 [330], [332].
[16] *Independent Commissioner Against Corruption Bill 2017,* 76(1).
[17] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 576 (Kirby J).
[18] See *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 (Deane J).
[19] *Evidence (National Uniform Legislation) Act* (NT) s 118.

> Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.[20]

Indeed, only 'rarely' and under compelling circumstances that are clearly defined is it appropriate to abrogate legal privilege.[21] Said differently, 'exceptional circumstances' must 'exist to warrant a departure from the standard position'.[22] No such circumstances are present with regard to a Territory ICAC, as evinced by the Martin Report's plain recommendation not to depart from the legal professional privilege upon the reasoned and evidence-based conclusion that 'the majority of jurisdictions have been able to function adequately without interfering with this fundamental principle'.[23] There is simply no compelling justification for 'removing or diluting the application of law governing legal professional privilege in the context of a Territory ICAC.'[24]

It is curious and incongruous that the ICAC Bill extends unequivocal, impervious protection to the 'decisions, proceedings or deliberations of' Cabinet and Cabinet committees, but does not fully protect privileged legal communications.[25] As the Martin Report outlined:

> Legal professional privilege is an important protection for individuals and entities which enables them to obtain legal advice without fear that their communications with their legal adviser will subsequently be disclosed to other persons. It is a protection which enables the client to speak freely with their legal adviser. Similar considerations apply to Confidentiality of Cabinet discussions which, like legal professional privilege should not be removed or diluted without strong reason ....[26]

The interest in preserving the well-established protection afforded to communications between a client and a lawyer is identical to the rationale for protecting Cabinet deliberations—to protect full and frank consideration of important and confidential issues without fear of reprisal or discovery of any form.

Opening previously privileged communications to scrutiny by any coercive body will necessarily have a detrimental effect on the nature of that advice in the future, to the

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[20] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [9], [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[21] Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (May 2008) 57.
[22] Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Rec 6–1.
[23] Martin report, above n 1, 202 [421].
[24] Ibid. 422 (emphasis added).
[25] *Independent Commissioner Against Corruption Bill 2017*, s 76(2).
[26] Martin report, above n 1, 202 [421].

detriment of Territorians.[27] As Murphy J stated in *Baker v Campbell*, preservation of legal privilege is 'essential for the orderly and dignified conduct of individual affairs', particularly in the midst of a 'social atmosphere which is being poisoned by official and unofficial eavesdropping and other invasions of privacy'.[28]

When a fundamental and substantive right—like the right to fully and frankly discuss legal issues with counsel—is withdrawn, the unavoidable consequence is that clients will likely no longer place their full faith in the legal and justice system. Collectively, Territorians will suffer as the effective and efficient administration of justice becomes more difficult and less candid. Clients may be reluctant to retain a lawyer or may withhold information from their lawyer, impairing the accuracy of the advice received and frustrating efforts at alternative dispute resolution.[29] These eventualities are particularly troubling, when the abrogation of the privilege will not substantially add to the effectiveness or efficiency of the ICAC.

Further, the prospect of public hearings being held further belies the rationale for abrogating legal privilege. Section 37 of the ICAC Bill sets forth that the 'ICAC may hold a public inquiry for an investigation'.[30] The prospect of an inquiry being held in public adds an additional layer of difficulty, meaning that privileged information may not only be disclosed, but disclosed to the public at large. Subsequent publication of such information might have a significant and undesirable effect on subsequent court proceedings, during which such disclosure may be found to be inadmissible.[31] This is precisely the reason why Queensland, Tasmania, Victoria and South Australia maintain legal professional privilege in their ICAC statutes. Furthermore, while New South Wales has abrogated legal professional privilege, compulsory examinations—which may include privileged information—are to be conducted in private.[32] The ability to conduct public investigations, while simultaneously abrogating legal professional privilege, is clearly antithetical.

Finally, the text of the ICAC Bill likely opens a door to further litigation concerning the scope of the privilege that is being abrogated. Section 76(1)(c) of the ICAC Bill states that: 'no privilege exists in favour of the Territory or a public body to protect the refusal or failure to give evidence on grounds of legal client privilege'.[33] Determining the entitlement for protection under the legal professional privilege doctrine is complicated, as can be defining

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[27] Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) 7.
[28] *Baker v Campbell* (1983) 153 CLR 52, 89.
[29] See NSW Young Lawyers, Submission to Australian Law Reform Commission, Parliament of Australia, *Inquiry into Client Legal Privilege and Federal Investigatory Bodies*, April 2007, 1-2.
[30] *Independent Commission Against Corruption Bill 2017*, s 37(1).
[31] See *X7 v Australian Crime Commission* [2013] HCA 29 [69]-[71] (Hayne and Bell JJ, with whom Kiefel J agreed).
[32] *Independent Commission Against Corruption Act 1988* (NSW), s 30(5).
[33] *Independent Commissioner Against Corruption Bill 2017*, s 76(1)(c).

holder of a privilege, particularly when the parties involved are office holders, executives or lawyers working for government departments or public bodies.[34] Notwithstanding the fact that the abrogation of legal professional privilege is not desirable or necessary, such a provision will likely substantially hinder—rather than assist—the work of the ICAC.

Pursuant to the recommendation included the Martin Report, the legal professional privilege should remain unaltered for the purposes of proceedings before the contemplated ICAC.

[34] See The Law Society of New South Wales, *A Guide to Ethical Issues for Government Lawyers* (The Law Society of New South Wales, 2nd Edition 2010) 15-23.