

INDEPENDENT COMMISSIONER AGAINST CORRUPTION BILL 2017

EXPLANATORY NOTES

Consultation

The Department of the Attorney-General and Justice is seeking your comments and suggestions on the Exposure Draft of the Independent Commissioner Against Corruption Bill 2017 (the 'ICAC Bill').

Comments can be as short or informal as an email or letter, or you may provide a more substantial document. Comments do not have to address all aspects of the Exposure Draft legislation. Electronic copies should be sent if possible. Comments should be sent:

by email to Policy.AGD@nt.gov.au

by post to:

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The closing date for comments on this Exposure Draft Bill and Regulations is Wednesday 26 July 2017.

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Any requests made to the Department of the Attorney-General and Justice for access to a confidential submission, feedback or comment will be determined in accordance with the *Information Act*.

Note: Although every care has been taken in the preparation of these Explanatory Notes to ensure accuracy, it has been produced for the general guidance only of persons wishing to provide comments on the issues. The contents of the notes do not constitute legal advice or legal information and they do not constitute Government policy documents.

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General Outline

The Bill proposes the creation of the Independent Commissioner Against Corruption ('ICAC'), a new anti-corruption watchdog for the Northern Territory. The ICAC is a body empowered to investigate the most serious corruption in the Northern Territory public sector. The Bill is a step towards implementing in principle 50 of the 52 Recommendations of the Report by Commissioner Martin AO QC as a result of his Anti-Corruption, Integrity and Misconduct Commission Inquiry ('the Martin Report').

Public Interest Disclosure Act to be repealed:

The Bill repeals the *Public Interest Disclosure Act*, and the ICAC replaces the Commissioner for Public Interest Disclosures ('Commissioner for PID'). The ICAC will take over the Commissioner for PID's ongoing investigations and whistleblower protection functions when the legislation commences.

ICAC will have broad jurisdiction and extensive powers:

The ICAC created by the Bill is an independent statutory office holder, but has broader jurisdiction and more extensive powers than the Commissioner for PID. Notably, the ICAC can investigate any public officer, including Members of the Legislative Assembly, and can do so of its own motion. In addition to the extensive powers it has to obtain information from public bodies, the ICAC can apply for warrants to search private premises. Consequential amendments to other legislation will make it possible for the ICAC to install surveillance devices, intercept telecommunications activities, and conduct covert operations.

Bill provides for voluntary and mandatory reporting, and whistleblower protection:

In order to ensure that the ICAC is able to obtain the information it needs to function effectively, the Bill provides that public officers are required to report corrupt conduct to the ICAC. The Bill also provides extensive protection to persons who report information about improper conduct. These protections include the protections currently available to whistleblowers under the *Public Interest Disclosure Act*, but include some additional measures to assist in the flexibility and workability of these mechanisms. In particular, the ICAC now has a power to direct public bodies to take action to protect a whistleblower, and a whistleblower who suffers an act of reprisal can now commence an action knowing that costs can only be awarded against them if the action was vexatious or without reasonable cause. The Bill makes clear that a person who reports information to the ICAC in good faith, believing it to be a report about improper conduct, is a person who acquires protection under the scheme. See Part 6 of the Bill for the whistleblower protection provisions.

Who can be the ICAC?

The ICAC is a person rather than a body corporate. The Bill provides strict conditions of eligibility for the ICAC and the Inspector, including requiring extensive legal experience. Persons who have had significant involvement in politics in the preceding five years are ineligible for appointment as the ICAC. If the ICAC encounters a conflict of interest, an Acting ICAC can be appointed concurrently to conduct the investigation. This Acting ICAC is completely independent from the ICAC, and can exercise any of the ICAC's statutory powers, but only for the purpose of carrying out a particular investigation.

Oversight of the ICAC

Oversight of the ICAC is provided by the Inspector, who has the ability to receive complaints about the ICAC, review the ICAC’s records, and requires the ICAC or staff of the ICAC to answer questions. If the Inspector has reason to believe the ICAC or the ICAC’s staff have been involved in improper conduct, the Act provides that a person with the powers of the ICAC can be appointed as a concurrent Acting ICAC investigate particular allegations. To avoid potential cross-investigations and conflicts, such an Acting ICAC cannot themselves have ever been a Territory public officer, and is ineligible to be appointed as the ICAC for two years following the investigation.

Consequential Amendments

In addition to the provisions in the Bill, there will be numerous consequential amendments of other legislation. These consequential amendments are still being refined, and may be introduced as a separate Bill. However, the following table provides an indicative summary of the matters that the consequential amendments will cover:

Legislation	Objective of Amendments
<i>Criminal Code Act</i>	- To provide that relevant corruption offences in Part IV of the Criminal Code are applicable to public officers as defined by the ICAC Bill.
<i>Correctional Services Act</i>	- To require the Commissioner of Correctional Services to facilitate the ICAC’s access to premises and records. - To place special requirements around processes for handling correspondence when a prisoner is a whistleblower or assisting the ICAC.
<i>Criminal Records (Spent Convictions) Act</i>	- To allow the ICAC to access information about spent convictions.
<i>Housing Act</i>	- To remove a reference to the <i>Public Interest Disclosure Act</i> which will be obsolete.
<i>Information Act</i>	- To provide for an exemption that can be applied to freedom of information requests to protect the ICAC’s functions, the Inspector’s functions, and identifying information concerning whistleblowers. - To modify the exemption for the <i>Public Interest Disclosure Act</i> , so whistleblowers and confidential investigations continue to be protected after that Act’s repeal.
<i>Interpretation Act</i>	- To define the term ‘ICAC’ so that it can be used and recognised in other Acts.
<i>Legislative Assembly (Disclosure of Interests) Act</i>	- To authorise the ICAC to inspect and take copy of the register of interests for Members of the Legislative Assembly.
<i>Police (Special Investigative and Other Powers) Act</i>	- To allow the ICAC to conduct controlled operations, similar to powers NT Police currently have.
<i>Public Sector Employment and Management Act</i>	- To provide that the Commissioner for Public Employment can deal with referrals from the ICAC under the <i>Public Sector Employment and Management Act</i> .

	- To provide that the ICAC is always the CEO of the ICAC's Office which is an Agency within the meaning of that Act
<i>Surveillance Devices Act</i>	- To allow the ICAC to install and use surveillance devices, similar to powers NT Police currently have.
<i>Telecommunications (Interception) Northern Territory Act</i>	- To provide that the ICAC has the power to intercept telecommunications, similar to powers the NT Police currently have. - (Note: these amendments will set up a framework that will allow the NT to apply to the Commonwealth Government for an exemption from Commonwealth offences that would otherwise apply to telecommunications interception activities.)
<i>Witness Protection (Northern Territory) Act</i>	- To allow persons who need physical protection as a result of their involvement with the ICAC to be considered for protection under the whistleblower protection scheme.
<i>Education and Care Services (National Uniform Legislation) Act</i>	- To remove what will be an obsolete reference to the <i>Public Interest Disclosure Act</i> .
<i>Evidence (National Uniform Legislation) Act</i>	- To replace a reference to the <i>Public Interest Disclosure Act</i> to the present Bill.
<i>Rail Safety (National Uniform Legislation) Act</i>	- To remove what will be an obsolete reference to the <i>Public Interest Disclosure Act</i> .

Comparable Interstate Legislation

At a number of points in these notes, references are made to equivalent interstate legislation to the ICAC Bill. The following abbreviations are used:

NSW ICAC Act – *Independent Commission Against Corruption Act 1988* (NSW)

SA ICAC Act – *Independent Commissioner Against Corruption Act 2012* (SA)

Vic IBAC Act – *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic)

WA CCC Act – *Corruption, Crime and Misconduct Act 2003* (WA)

Qld CC Act – *Crime and Corruption Act 2001* (Qld)

A Note on Offences and Penalties

The Bill provides for a typical array of offences for a body of this nature, including a mix of strict liability offences (which are easier to prove but carry lower penalties, because a person can be liable regardless of whether they intended to commit the offence), and offences that require intention / reckless to be proved (which, if made out, carry higher penalties).

The more major offences carry a maximum penalty of 400 penalty units or 2 years imprisonment. While 400 penalty units would more often align with a penalty of 4 years imprisonment, the penalty chosen reflects a further consideration: coercively obtained evidence can be led in criminal proceedings for offences against this Bill, and a policy decision has been made to avoid such

evidence being admitted into proceedings for an indictable offence. The particular rationale for particular penalties is explained in the notes for the clause containing that offence and penalty.

The penalties are similar to those used in the *Public Interest Disclosure Act*, which this Bill repeals and replaces, and are in a similar range to interstate equivalents. These offences and penalties have been effective in ensuring compliance with request of the PID Commissioner during the past 7 or so years the *Public Interest Disclosure Act* has been operational.

Following is a summary of the Bill by reference to each clause of the Bill.

Part 1 – Preliminary & Definitions

1. Short title

This is a formal clause, which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Independent Commissioner Against Corruption Act 2017*. It reflects that the Bill creates the role of an independent statutory officer who is charged with investigating and dealing with corruption in accordance with the provisions of the Bill.

2. Commencement

This is a formal clause that provides that the Act will commence on a day fixed by the Administrator by notice in the NT Government Gazette.

3. Primary Object

The objects of the Act provide guidance as to Parliament's intention, which assists in the interpretation of the Act, particularly with respect to exercising discretion. It clarifies that while most of the ICAC's powers and procedures are directed towards investigation, investigation is not an end in and of itself. The ultimate goals of the ICAC in carrying out its functions are to:

- prevent or minimise the occurrence of improper conduct;
- improve public confidence that improper conduct will be detected and dealt with appropriately;
- encourage the reporting of improper conduct and encourage people to assist the ICAC;
- protect persons who report improper conduct (whistleblower protection); and
- augment the Territory's existing framework for responding to improper conduct.

While the ICAC's jurisdiction is defined broadly, its role is not to usurp the function of other public bodies but to be able to address gaps in the existing integrity framework. In particular, the ICAC will have strong powers suitable for dealing with the most serious, systemic, and sensitive improper conduct, and that is where it is supposed to direct most of its efforts and resources. However, it is also able to look at more minor matters when these are part of the allegations of corrupt conduct, and to coordinate a response to improper conduct that involves multiple bodies. Its broad jurisdiction ensures it is able to fulfil this role, and also assist it to gather adequate intelligence by broadly defining the matters that can be reported to the ICAC under the whistleblower protection scheme.

4. Definitions

This clause provides an alphabetical list of simpler definitions of key words and expressions used in the Act. Where a definition is more complex, this clause directs the reader to the appropriate clause of the Act where the clause is fully defined. The definitions are intended to be read in conjunction with statute book wide definitions already contained in the *Interpretation Act*.

While the defined terms are provided alphabetically in the Bill, they have been grouped here conceptually to assist in understanding what has been defined and how these terms are used in the Bill:

Terms defining persons and bodies who can exercise powers under this Bill:

A number of different entities are defined:

‘Acting ICAC’ is defined under clause 118. At various points, the Bill distinguished between an Acting ICAC and an Acting ICAC appointed under clause 118(2)—the latter means an Acting ICAC appointed to investigate the ICAC, the ICAC’s Office, or a member of the ICAC staff, and has additional eligibility requirements;

‘Assembly Committee’ is defined under clause 5, which refers to designating a committee of the Legislative Assembly to handle certain matters concerning the ICAC;

‘authorised officer’ means the ICAC or a person appointed by the ICAC to exercise the ICAC’s coercive powers. It is used in clauses concerning applications for search warrants and other exercises of the ICAC’s power in Part 4, and is used to reflect the fact that it may be the ICAC or an investigator appointed by the ICAC who exercises these powers in practice. It is used in Part 5 to set out how authorised officers must handle privileged material. Part 7, Division 3 provides for the appointment of authorised officers and issuing of identity cards. Clauses 147 and 148 provide that it is an offence for a person to obstruct or falsely represent that they are an authorised officer;

‘ICAC’ means the statutory role of the Independent Commissioner Against Corruption established by clause 15. A consequential amendment to section 17 of the *Interpretation Act* will be made provide a definition of the term ‘ICAC’ which can be used throughout NT legislation;

‘ICAC’s Office’ refers to the staff that the ICAC administers. The Bill creates the ICAC as a statutory officer with staff who assist. A consequential amendment to Schedule 1 of the *Public Sector Employment and Management Act* will ensure that the Office is a separate Agency and the ICAC is the CEO of that Agency;

‘Inspector’ means a statutory role appointed to conduct audits of the ICAC and investigate complaints in order to ensure that the ICAC is not acting *ultra vires* (beyond power), and is appointed under clause 131;

‘member of ICAC staff’ is defined by clause 120, and broadly includes employees, seconded employees and officers of another Agency, and consultants. Subclause (2) provides that a seconded police officer continues to have powers and duties as a police officer unless otherwise provided by agreement between the Commissioner of Police and the ICAC;

‘member of Inspector’s staff’ is defined by clause 139, and means persons engaged by the Inspector as consultants, or Agency staff made available to the Inspector under an arrangement;

Terms used to define the ICAC’s eligibility:

‘Australian parliament’ is a term used in clause 111 with respect to the eligibility of the ICAC. The ICAC cannot be a member of an Australian parliament. It is also used in clause 115 to provide that the ICAC’s appointment is automatically terminated if the ICAC becomes a candidate for election as a member of an Australian parliament;

‘eligible person’ is used to refer to a person who may be appointed as the ICAC or the Inspector, at clauses 111 and 131 respectively;

‘superior court’ is a term used in clause 111 with respect to the eligibility of the ICAC. A former judge of a superior Court is an eligible person for appointment as the ICAC. Superior Court means a Supreme Court, Federal Court, or High Court of Australia.

Terms relating to referrals:

‘independent entity’ is a term used to define entities that handle referrals from the ICAC with a greater degree of independence. These bodies are statutory officers or bodies that have a high degree of independence and would usually conduct their functions without oversight, or bodies from other jurisdictions that could not be subject to the ICAC’s direction but may be suitable to handle a referral of an allegation of improper conduct.

Whether the Commissioner of Police is an independent entity is dependent on the circumstances. Generally, when criminal matters are referred to Police for further investigation, the Commissioner of Police will be treated as an independent entity. Investigating such matters are part of the core functions of Police and it would not be desirable for such investigations to be complicated by coordinating with the ICAC unless this was necessary. However, where such allegations concern alleged improper conduct by a police officer, or the ICAC has good reason to maintain oversight of the matter, the Commissioner of Police is not treated as an independent entity.

It should be noted that misconduct or unsatisfactory conduct referred to Police can also be oversighted by the Ombudsman in accordance with the Ombudsman’s existing responsibilities to oversight investigations into misconduct by Police.

‘law enforcement agency’ is defined broadly to include any Australian entity that has functions in relation to the investigation or prosecution of offences. Law enforcement agencies are one kind of body that the ICAC can refer matters to under clause 23. A broad definition has been adopted rather than a list of bodies, since the ICAC has discretion not to refer if there is good reason not to refer and a list of bodies would require continual updating, which would be onerous particularly with respect to interstate bodies;

‘referral’ means the referral of a matter by the ICAC in accordance with Part 3, Division 4, which can be found at clauses 23 to 28. This Division specifies who are appropriate bodies to accept different kinds of referrals, permits consultation and information sharing for the purpose of a referral (including for discussions about whether to refer a matter), and provides that the ICAC can exercise oversight over referral entities that are not independent entities;

‘referral entity’ is a body to which the ICAC can refer a matter and is defined by clause 23.

Defined jurisdictional concepts:

The following concepts which affect the ICAC’s jurisdiction are defined:

‘conduct’ and a range of related terms are listed in this clause, namely **‘corrupt conduct’**, **‘engage in conduct’**, **‘improper conduct’**, **‘misconduct’**, **‘unsatisfactory conduct’**, **‘anti-democratic conduct’**, and **‘occur’**. This clause refers to the full definitions of these terms in Part 1, Division 2, which is found at clauses 8-14;

‘public body’ refers to clause 14, which defines those bodies that can be investigated by the ICAC for improper conduct;

‘public officer’ refers to clause 14, which defines those persons who can be investigated by the ICAC for improper conduct. The following related terms are also found in clause 4 and define specific categories of public officers:

- ‘**judicial officer**’ is defined to include a judge of either the Supreme or Local Courts of the Northern Territory, and also includes the position that is presently known as the ‘Master’ of the Supreme Court;
- ‘**MLA**’ is defined to mean a member of the Legislative Assembly;

‘**breach of public trust**’ is a category of improper conduct that helps to define the ICAC’s jurisdiction. The ICAC’s jurisdiction is defined by clauses 9-12 to relate to conduct that has the requisite seriousness, the requisite connection to public affairs, and the requisite quality of wrongfulness. The term ‘breach of public trust’ is used to define the quality of ‘wrongfulness’ needed for a matter come within the ICAC’s jurisdiction. This statutory definition of ‘breach of public trust’ replaces the common law definition for the purpose of this Act.

The statutory definition of ‘breach of public trust’ provides that a conduct is a breach of public trust to the extent that the public officer or public body is acting in a way that is intentionally or recklessly inconsistent with the functions of the body or officer, including the duty of the body or officer to act in the public interest.

The functions of the body or officer are its official functions.

The language of this definition is intended to give effect to the substance of the proposed jurisdiction of the ICAC as recommended in paragraph [149] of the Martin Report, particularly at points (1)(a) and (1)(c), bearing in mind the interpretation of a similar provision by the High Court in *Independent Commission Against Corruption v Margaret Cunneen & Ors* [2015] HCA 14 (‘the *Cunneen* case’). The other points of paragraph [149] are addressed particularly through clause 10 of the Bill.

When the statutory definition of breach of public trust is combined with the statutory tests for seriousness and connection with public affairs, a breach of public trust is only corrupt conduct that the ICAC would investigate when it is also serious enough that it warrants termination of service or is an offence that carries a maximum penalty of more than two years imprisonment, and occurs in the course of the person carrying out their duties as a public officer or is otherwise sufficiently connected to public affairs.

The definition in the Bill represents a variation from the use of the term at common law, because the common law term evolved to describe a criminal offence and incorporates tests for wrongfulness, seriousness, and connection to public affairs that do not quite align with the tests provided in the Bill. At common law, ‘breach of public trust’ defines the relevant wrongfulness in terms of ‘dishonesty’, ‘wilfulness’, ‘malice’ and ‘intention’ (see, for example *R v Quach* (2010) 27 VR 310). At common law, these elements were used to determine both the seriousness and wrongfulness of a matter that was appropriate for criminal sanctions.

By contrast, the ICAC’s jurisdiction and purpose is not simply to investigate criminal matters. The ICAC’s jurisdiction also relates to conduct that would warrant termination of service or disciplinary action. It would be confusing and inconsistent to incorporate the common law’s requirement of wilfulness, malice, and intention in addition to these tests. Conduct that is serious enough to warrant termination of service is intended to be within the ICAC’s jurisdiction irrespective of whether it was motivated by malice. For example, it may simply be conduct that is intentional but not intentionally malicious, but shows a gross disregard of the public interest, and due to surrounding contextual factors such as the seniority of the position it would warrant termination of service.

As mentioned above, in developing this definition, consideration was given to the *Cunneen* case. The decision in that case limited the jurisdiction of the NSW ICAC to conduct that had an element of

wrongful behaviour by the relevant public officer. In that case, the ICAC suggested that it had jurisdiction to investigate a matter where there was an alleged attempt by an public sector officer in a private capacity to adversely impact the ability of a police officer to effectively carry out a breath test by engaging in conduct which, unbeknownst to the police officer, interfered with the test working effectively. The High Court disagreed, taking the view that the ICAC was limited to adverse effects to the ‘probity’ and not simply the ‘efficacy’ of official functions. ‘Probity’ referred to whether there was some kind of conscious engagement in wrongful conduct by the public officer, as distinct from ‘efficacy’, which referred to whether the public officer was able to achieve a particular result on a given occasion.

The definition in the Bill is intended to operate so that a person in the position of the police officer who administered the breath test in the *Cunneen* case would not have engaged in a ‘breach of public trust’ (and so not engaged in corrupt conduct) under the definition in the Bill. The police officer would not have behaved in a way inconsistent with his or her duties, just because a third person attempts to engage in conduct intended to impede the police officer in carrying out his or her duties effectively.

In the *Cunneen* case, it seems that the target of the NSW ICAC was not the police officer but Ms Cunneen, who was a very senior Crown prosecutor. The substance of the allegations being investigated was that Ms Cunneen allegedly advised a family friend who was pulled over for a random breath test to fake chest pains in order to delay the administration of a breath test to a point in time when the person’s blood alcohol content would presumably have lessened. The alleged actions were undertaken in a private capacity and not as a prosecutor or as a lawyer to a client.

Under the proposed definitions in the Bill, it is anticipated that the NT ICAC would also not investigate the prosecutor in an equivalent scenario to the *Cunneen* case, because the conduct would not have been inconsistent with the prosecutor’s duties, given that a prosecutor’s duties do not extend to the sort of private conduct alleged. The reference to ‘effective’ in ‘connected to public affairs’ is specifically worded to be limited to the effective performance of the duties of the public officer who is alleged to have committed the improper conduct.

The question of whether there has been a breach of public trust is determined by reference to the public officer’s duties at the time the conduct occurred. This means that if the allegations concern conduct that a person engaged in prior to becoming a public officer, or prior to taking up relevant duties as a public officer, the definition of ‘breach of public trust’ will not be satisfied and the ICAC will not have jurisdiction by virtue of that test.

However, it can be noted that in limited circumstances, namely certain offences specified by clause 10(5) of the Bill, being offences that specifically relate to corruption of public office, even conduct affecting the efficacy is included.

‘connected to public affairs’ – is an element of improper conduct that helps to define the ICAC’s jurisdiction. As discussed above in relation to ‘breach of public trust’, the ICAC’s jurisdiction is defined to relate to conduct that has the requisite seriousness, the requisite connection to public affairs, and the requisite quality of wrongfulness. To be investigable by the ICAC, conduct must satisfy all three tests. The connection to public affairs can be made in one of three ways:

- conduct that occurs in the course of or in circumstances closely related to the performance of official functions or duties of the public officer, including conduct engaged in otherwise than in the performance of official functions that adversely affects or could adversely affect the honest, impartial or effective performance of those functions (meaning, the functions of the public officer who has committed the conduct);

- conduct that involves the use of public resources; or
- conduct that involves the use of authority or perceived authority that a person has as a result of being a public officer or representing themselves as a public officer.

The term circumstances ‘closely related to the performance of official functions and duties’ is defined to include conduct that is engaged in while off duty that adversely impacts or could adversely impact the honest, impartial, or effective exercise of the public officer’s official functions and duties. This is provided at clause 4(2).

‘function’ – this term is defined to include a duty and power, which is a standard definition designed to ensure that the term function is not subject to technical arguments that its ambit is narrow and confined to functions that are not duties or powers. The related term **‘perform’** provides that to perform a function includes to exercise a power;

‘official information’ is used in clause 10 to define a kind of corrupt conduct, namely inappropriate conduct in relation to official information. ‘Official information’ extends beyond information held in formal records to information known to the public body or public officer in relation to official functions, including information that is not recorded.

‘public resources’ is defined broadly to include not only money, but assets, infrastructure, intellectual property, licences, human resources, and other resources of or available to the public sector. The term is used in the Bill to clarify the extent of the ICAC’s jurisdiction. Where conduct must be ‘connected to public affairs’, this term includes ‘conduct involving the use of public resources’. Clause 10 also provides that one element of corrupt conduct involves misappropriating or misusing public resources. Clause 12 provides that one element of unsatisfactory conduct is to take certain inappropriate action with respect to public resources.

Defined concepts for whistleblower protection:

The following concepts are defined in relation to the Bill’s whistleblower protection scheme:

‘engage in retaliation’ refers to action taken to retaliate against a whistleblower and other protected persons for making a protected disclosure, see clause 92;

‘harm’ is used for the purposes of defining what is retaliation under the Bill’s whistleblower protection scheme (see Part 6), and is defined broadly to include matters such as adverse conduct in the workplace, which is typical of whistleblower protection schemes. In addition, a separate, narrower definition is used in clause 109, which provides the threshold test for when the ICAC may take steps to protect a person’s physical safety.

‘identifying information’ refers to information that would allow someone to identify a whistleblower or other protected person. The Bill requires such information to be treated with particular care.

‘prohibited reason’ is a term used to define when action which harms a whistleblower or other protected person is prohibited, namely when the harm occurs in connection with the person making or being suspected of making a report about improper conduct, as defined by clause 92;

‘protected action’ refers to clause 89, which defines the kinds of reporting and assistance protected by the whistleblower protection scheme in the Bill. A person who takes protected action is a ‘protected person’. A ‘protected communication’ is a kind of protected actions. A person who assists

the ICAC in ways other than making a protected communication may also be taking a protected action.

‘protected communication’ is a term used to define what reports of improper conduct are protected by the whistleblower protection scheme, and its meaning is set out by clause 90. A protected communication must be made to person or body listed in that clause and also meet other criteria. Reports that do not technically meet the criteria of a protected communication can be declared to be a protected communication by the ICAC under clause 91 on a discretionary basis, after considering certain matters. The definition of protected communication is very similar to the definition of the term ‘disclosure’ used in the *Public Interest Disclosure Act* and other interstate public interest disclosure schemes, which are whistleblower schemes by another name.

‘protected person’ means a person who takes or has taken protected action. This term essentially refers to persons who are whistleblowers under the whistleblower protection provisions, as well as some additional persons.

‘retaliation’ refers to conduct aimed at harming a whistleblower or other protected person for their taking protected action or suspected protected action, and is defined by clause 92. Engaging in retaliation is an offence (either under clause 97 or 98 depending on the nature and circumstances of the retaliation), and is a matter for which compensation and injunctive remedies can be sought. The term retaliation is similar to an ‘act of reprisal’, which is sometimes used in public interest disclosure schemes. ‘Retaliation’ has been chosen for the ICAC Bill as a more intuitively understood term.

‘victim’ is defined in clause 92 to refer to a victim of retaliation.

Defined concepts for powers and procedures:

The following concepts are defined in relation to procedures:

‘public inquiry’ and related concepts. While most ICAC investigations will be handled in private, the ICAC does have the capacity to conduct public inquiries under Part 3, Division 6. Terms used for public inquiries include:

- **‘public inquiry’**, which is defined by clause 37. Part of an investigation may be handled by means of a public inquiry;
- **‘closed session’** and **‘open session’** are terms used to distinguish between those parts of a public inquiry that are open to the public and those that are held in private. See Part 5, Division 1, particularly clause 75;
- **‘public inquiry report’** – see terms relating to reports below;

‘investigation’ and related concepts, in particular:

- **‘give evidence’** – is defined by to broadly refer to answering a question, giving information, or producing a document or other thing for an investigation, meaning it is not limited to giving evidence during an examination;
- **‘investigation’** – the ICAC has the power to investigate in accordance under clause 29. This is a formal stage in the ICAC’s processes of responding to improper conduct. The term includes a joint investigation carried out in accordance with clause 36;
- **‘investigation report’** – see terms relating to reports below;

- **‘premises’** clarifies the meaning of this word for the purpose of provisions relating to search warrants. This clarification makes clear the definition extends beyond buildings to include land, entering any kind of structure on land, and aircraft, vehicles, and vessels;
- **‘search warrant’** means a search warrant issued under clause 65 of the Bill, which allows the ICAC to search private premises;
- **‘witness’** means a person who gives evidence for an investigation under this Act.

Terms relating to matters of **privilege**. Terms used include:

- **‘claimant’** is defined in clause 81 to mean a person who is entitled to claim privilege, and is used in Part 5, Division 2 to set out processes for resolving disputed claims of privilege;
- **‘parliamentary privilege’** – is defined by clause 80 and includes a privilege, immunity or power;
- **‘proper officer’** is defined by clause 81 and is used to refer to a designated person who acts as a representative of the Supreme Court with respect to handling privileged items;
- **‘representation’** has a specific meaning when used in Part 5, Division 1, where it is defined by clause 75 and is used to set out the subsequent use that can be made of evidence given in circumstances where the privilege against self-incrimination has been abrogated. The definition refers to the Dictionary to the *Evidence (National Uniform Legislation) Act*, where it is defined to include:
 - an express or implied representation (whether oral or in writing); or
 - a representation to be inferred from conduct; or
 - a representation not intended by its maker to be communicated to or seen by another person; or
 - a representation that for any reason is not communicated.
- **‘secured item’** means an item sealed in an envelope or otherwise secured in accordance with clause 85. ‘Item’ is also a defined term in the Bill (see below in definitions relating to ‘other matters’).

Various kinds of **reports**. Terms used include:

- **‘general report’** – as defined by clause 45, is a report on general matters that are not the results of a particular investigation. A general report could concern systemic issues, matters concerning the reporting of improper conduct, or matters impacting on the performance of the ICAC;
- **‘investigation report’** – is a report about the ICAC’s findings as a result of an investigation as defined by clause 47. It may or may not include recommendations;
- **‘public inquiry report’** – means a report resulting from a public inquiry made under clause 49;
- **‘brief of evidence’** – is a collection of information provided by the ICAC to a law enforcement agency (eg. Police, the DPP etc.) or public body for the purpose of investigating, prosecuting, or taking disciplinary action against a public officer. It is provided for by clause 48. It is not subject to the same restrictions on content and procedure as an investigation report, and would not typically contain recommendations
- **‘public statement’** is defined by clause 52, and provides circumstances in which it is clear that the ICAC may offer public comment, given the default position that the ICAC conducts matters in private and is subject to confidentiality obligations;

- **‘responsible Minister’** is used to designate an appropriate person to respond to recommendations and certain reports the ICAC can make, and is defined to mean the minister having responsibility for the area of government or activity that is applicable to the public body or public officer in question. This will necessarily turn on what is provided by the Administrative Arrangements Order in force at time the response is required, as provided by section 19(3) of the *Interpretation Act*.

Terms relating to **directions** the ICAC can issue, include:

- **‘non-disclosure direction’** – refers to the power to direct a person not to disclose confidential information under clause 142, which is more restrictive than the default confidentiality offence under clause 141;
- **‘retention notice’** means a notice issued under clause 68(e) and in accordance with the procedure set out in clause 69. A retention notice requires an object or thing not to be moved or interfered with. The object must be evidence of improper conduct and it is anticipated such a notice might be used with objects or things that cannot easily be seized, or there are other reasons to leave the object *in situ* for the time being and a retention notice may be sufficient to deter interference with the evidence;

Other matters:

‘health practitioner’ is a definition relevant to offences of disclosing confidential information (see clauses 140-142). It allows a person to reveal such information if it is necessary to obtain assistance from a medical practitioner or a registered psychologist.

‘ICAC premises’ is used in clauses 62 and 136 with respect to provisions defining who has access to the premises and information of the ICAC. The meaning of the term turns on occupation of premises by the ICAC, the ICAC’s Office, or a member of ICAC staff.

‘item’ – is a term used to refer to a document or thing;

‘misleading information’ includes information that is misleading in a material and specific way, including by omission. It is used in a number of clauses in the Bill:

- in relation to the definition of ‘corrupt conduct’ that the ICAC can investigate under clause 10(4);
- in relation to providing that a person cannot receive whistleblower protection for providing misleading information under clause 87;
- in the offence of providing misleading information to a person acting in an official capacity under this Act, which is clause 147.

‘political party’ is used both in the definition of anti-democratic conduct in clause 13 and in clause 111 to limit eligibility of persons to be appointed as the ICAC to persons without current or recent political affiliations, as defined by that clause. This Bill uses the definition of ‘political party’ in section 3 of the *Electoral Act*, namely ‘an organisation (whether incorporate or unincorporated) an object or activity of which is the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it’.

‘public resources’ is a definition used to specify the ICAC’s jurisdiction. Misappropriate and misuse of public resources is a kind of corrupt conduct specified by clause 10, and substantial mismanagement or inappropriate or significantly inefficient use of public resources is a kind of unsatisfactory conduct specified

by clause 12. The definition of the term makes clear that public resources are not just limited to cash and assets, but encompass intellectual property, human resources, and other less tangible resources.

5. Assembly Committee

This clause provides for the Legislative Assembly to designate a committee to carry out functions in relation to this Bill concerning ICAC matters. The committee may be a current committee or new committee established under the Legislative Assembly's existing power. Section 3 of the *Legislative Assembly (Powers and Privileges) Act* defines a committee.

6. Act binds Crown

This is a standard clause that provides that the Bill is intended to apply to the Crown. It is arguably clear that the Act binds the Crown by necessary implication, since it is nearly entirely directed to investigations of bodies that are emanations of the Crown. However, some aspects of the ICAC's jurisdiction allow investigations of persons and bodies that are not emanations of the Crown (eg. private persons engaged in collusive tendering). The provision is included for clarity. The provision (see clause 10(3)) that extends the ICAC's jurisdiction beyond public bodies in this way is derived from the NSW ICAC Act, and that Act includes a specific provision to bind the Crown.

7. Application of Criminal Code

This is a standard clause that provides that Part IIAA of the Criminal Code applies to an offence against this Act. Part IIAA of the Criminal Code states the general principles of criminal responsibility, establishes general defences, and deals with burden of proof. Part IIAA also defines, or elaborates on, certain concepts commonly used in the creation of offences.

8. Meaning of *conduct*

This clause defines the term 'conduct', which is in other clauses is used to assist in defining the different types of alleged actions that the ICAC is able to investigate. It specifies that conduct can be an act or an omission, that relevant conduct can have occurred before the commencement of the Act (the Act will be fully retrospective), and also the geographical and temporal nexus required. Clause 8 clarifies that the ICAC can investigate conduct by a person who was a public officer at the time the conduct occurred, even if the person is no longer a public officer.

Subclause (3) of this clause defines the circumstances where a public body is taken to have engaged in conduct engaged in by other persons or bodies. In real terms, public bodies can only engage in conduct through the actions of employees, officers, and agents. The circumstances where the public body can be investigated for the actions of other persons and bodies include when the person or body is acting on behalf of the public body, and when the public body has a corporate culture that directs, encourages, tolerates, otherwise causes, or fails to deter or prevent the conduct from occurring. It is implicit that a public body can only be held responsible for improper conduct if it can reasonably be taken to have a duty that relates to the kind of improper conduct in question.

In drafting this clause and having regard to the Martin Report there does not to be any reason to distinguish between politicians, public servants and juridical officers in relation to the retrospective application of the legislation to activities that may have occurred prior to the commencement of the legislation.

9. Meaning of *improper conduct*

This clause provides that ‘improper conduct’ is an overarching term to describe conduct that can be investigated by the ICAC. Improper conduct can be of a number of different types which are defined further in the Bill, including corrupt conduct (defined further at clause 10), misconduct (defined further at clause 11), unsatisfactory conduct (defined further at clause 12), and anti-democratic conduct (defined further at clause 13). A fifth type of improper conduct is conduct that amounts to an offence provided by the Bill. This includes various offences relating to failure to comply with the ICAC’s directions, misuse of confidential information, providing false or misleading information to the ICAC, and an act of retaliation against a whistleblower.

Subclause (2) defines a range of ways in which a person who does not themselves commit the improper conduct can nevertheless be investigated—this includes when improper conduct was attempted (but not carried out), when the person aided and abetted a person to commit improper conduct, incited improper conduct, or the improper conduct was carried out as a conspiracy or in the pursuit of a common purpose. The clause is written to align with definitions in the Criminal Code, but to enable investigation of improper conduct whether or not that improper conduct is also an offence.

10. Meaning of *corrupt conduct*

This clause defines the primary kind of improper conduct that is intended to be investigated by the ICAC. The Bill divides improper conduct generally into three tiers of seriousness. This is similar to the approach taken by the SA ICAC Act, and consistent with the Recommendations of the Martin Report. ‘Corrupt conduct’ is the highest tier, meaning it refers to the most serious kinds of improper conduct. The ICAC will primarily focus on investigating conduct that fits within the definition of ‘corrupt conduct’, as it should refer less serious conduct to other bodies to investigate in most circumstances (see clause 16(2)(b)).

The definition of corrupt conduct refers to actions of public officers and public bodies with the requisite degree of seriousness, wrongfulness, and connection to public affairs. The phrase ‘connected to public affairs’ is defined in the definition clause of the Bill.

Clause 10 of the Bill specifies the requisite degree of seriousness for corrupt conduct is:

- the conduct constitutes an offence for which the maximum penalty is imprisonment for a term of at least 2 years;
- for an MLA or local government councillor – the conduct involves a serious breach of public trust;
- for any other public officer – the conduct amounts to reasonable grounds for termination of service; or
- for a public body – the conduct is a serious breach of public trust.

The requisite kind of wrongfulness for corrupt conduct is:

- the conduct constitutes an offence; or
- the conduct involves dishonest, failure to manage a conflict of interest, breach of public trust (a term defined in the Bill), illegal or unauthorised or otherwise inappropriate performance of official functions, inappropriate conduct in relation to official information, or an adverse effect

on the honest, impartial or effective performance of official functions by any public officer or public body or group of public officer or public bodies.

In addition, further kinds of corrupt conduct that can be committed by any person (not just a public officer) are defined by subclause (4). These categories of corrupt conduct extended to persons outside the public sector were specifically recommended by the Martin Report, and the definition reflects categories of conduct prescribed by s 8(2A) of the *ICAC Act (NSW)*. These categories were inserted in NSW following the dispute in the *Cunneen* case to ensure that the ICAC could investigate certain matters that impacted on the integrity of the public sector, even if public officers were not knowingly involved in any impropriety. A discussion of the *Cunneen* case can be found on page 14 of these explanatory notes. Subclause (4) requires the connection to public affairs to be that the conduct would, if publicly known, impair confidence in public administration. The categories of wrongful conduct are:

- collusive tendering;
- intentionally or recklessly providing false or misleading information in order to obtain a licence, permit, or other authority to engage in conduct that would otherwise be prohibited by a regulatory scheme;
- misappropriating or misusing public resources;
- assisting with or dishonestly benefiting from the misappropriation or misuse of public resources; and
- dishonestly obtaining or retaining employment or appointment as a public officer.

The definition is worded to clarify that the kinds of licences and authorities referred to extend to ‘promoting or protecting health and safety, the environment or the amenity of an area’ as well as to ‘facilitate the management and commercial exploitation of resources’. Some changes have been made to ensure relevant NT statutory schemes for providing licences, permits, and authorities are within the NT ICAC’s jurisdiction. The Bill differs from the NSW ICAC Act in that it uses the wording ‘protect or promote’, ‘amenity’ as well as ‘environment’, and includes ‘public health’ alongside ‘health and safety’. The wording in the NSW ICAC Bill was potentially ambiguous in terms of whether it captured some relevant NT schemes.

In addition, any person can be investigated for conduct that would amount to a range of corruption offences specified in Part IV of the Criminal Code. As recommended by the Martin Report, a broad threshold test has been used, which relates to an adverse impact on the honest, impartial or effective performance of official functions by any public officer or public body. This is intended to ensure the example given in the Martin Report of a bribe offered to a public officer of unimpeachable honesty is a matter the ICAC can investigate. However, a change has been made from what was proposed in the Martin Report. The definition proposed in the Martin Report referred to investigating ‘any person’ for any offence with a penalty of 2 or more years imprisonment if this affected the effective performance of official functions. If this test were to be applied to ‘any person’, it would inadvertently capture conduct that does not have the flavour of corruption—for example, a private individual drunkenly resisting arrest. For this reason, the Martin Report’s recommended definition has been refined so that the ICAC’s jurisdiction to investigate persons who are not public officers refers to conduct that has the character of ‘corruption’ – which in subclause 10(5) includes a range of offences in Part IV of the Criminal Code, with the ability to prescribe further applicable offences by Regulation, if these are created or identified in the future. Public officers can be investigated for offences carrying a penalty of 2 or more years imprisonment. Private individuals who commit offences without the character of corruption such as resisting arrest may still be investigated by Police.

11. Meaning of *misconduct*

This clause defines the second tier of improper conduct. As a kind of improper conduct, misconduct can be reported under the whistleblower protection provisions, but as it is less serious than corrupt conduct, the ICAC will generally refer misconduct to another body for investigation. If referral is not appropriate, the inclusion of misconduct within the definition of improper conduct at clause 9 means that the ICAC still has the ability to investigate the allegation itself.

Similarly to corrupt conduct, it is defined by reference to seriousness, wrongfulness, and connection to public affairs.

Clause 11 of the Bill specifies the requisite degree of seriousness for misconduct. It must be conduct that falls short of corrupt conduct and where:

- the conduct constitutes an offence for which the maximum penalty is less than 2 years;
- for an MLA, local government councillor – a breach of public trust not amounting to a serious breach of public trust (serious breaches would be corrupt conduct);
- for a judicial officer – a breach of public trust (serious breaches are not excluded to ensure that a serious breach that is not grounds for termination of service of the judicial officer is still covered by the definitions of improper conduct);
- for any other public officer – the conduct amounts to reasonable disciplinary action; or
- for a public body – a breach of public trust not amounting to a serious breach of public trust.

The requisite kind of wrongfulness and connection to public affairs for misconduct is identical to that for corrupt conduct.

12. Meaning of *unsatisfactory conduct*

This clause defines the third tier of improper conduct, and refers to the least serious kinds of improper conduct. The definition closely follows conduct defined as ‘maladministration’ in the South Australian *ICAC Act*. The term ‘unsatisfactory conduct’ is intended to make the meaning of this kind of improper conduct more accessible to non-lawyers rather than to change the meaning of what is encompassed by the concept of maladministration.

Unsatisfactory conduct includes not only illegal and inappropriate conduct, but conduct that is negligent or incompetent. While this initially seems very broad, the kinds of conduct covered are further limited by other parts of the clause. In particular, the conduct must actually cause one of four negative outcomes:

- substantial mismanagement of public resources;
- inappropriate or significantly inefficient use of public resources;
- substantial mismanagement in relation to the performance of official functions; or
- substantial detriment to the public interest.

In addition, the clause provides a definition of ‘incompetence’ that limits this term to what is objectively significant incompetence. It explicitly excludes conduct that is less than best practice, or a matter of policy about which reasonable public officers or public bodies may disagree. It is defined by reference to the ‘reasonable public officer or public body’, and limited to conduct that would not be engaged in by such a person, assuming that they have the skills and knowledge reasonably expected of such a person or body, and assuming that they have taken appropriate steps to obtain

adequate resources, information and advice. This means, for example, that a person who engages in significantly objectively incompetent behaviour as a result of wilful ignorance will have engaged in unsatisfactory conduct if the conduct results in one of the four negative outcomes. Where the conduct is of a kind that reasonable and properly informed public officers may have differing views depending on their views on the merits of policies and appropriate priorities, this will not be unsatisfactory conduct.

As a kind of improper conduct, unsatisfactory conduct can be reported under the whistleblower protection provisions, but as it is less serious than corrupt conduct, the ICAC will generally refer it to another body for investigation. If referral is not appropriate, the inclusion of unsatisfactory conduct within the definition of improper conduct at clause 9 means that the ICAC has the ability to investigate the allegation itself.

In order to preserve the independence of the judiciary (including persons performing coronial functions), the ICAC cannot investigate mere unsatisfactory conduct of judicial officers performing their judicial functions. Issues may exist as to whether these kinds of limitations for judicial officers should also apply to politicians.

13. **Meaning of *anti-democratic conduct***

This clause defines a further kind of ‘improper conduct’, meaning certain offences in relation to elections and the electoral process. It allows the ICAC to investigate conduct which amounts to an offence under the *Electoral Act* and electoral provisions in the *Local Government Act* that are capable of broadly undermining democratic processes in the Territory. It excludes offences such as an individual defacing their own ballot paper, which do not have this broader impact. Offences relating to affecting the reputation, power, influence, or resources of a political party or a candidate for an election are included, meaning matters such as improprieties in relation to political donations or techniques such as push polling are matters that are intended to fall within the ICAC’s jurisdiction. More broadly, offences that are intended to improperly influence voting behaviour are also included, even if the conduct is not being engaged in to advantage or disadvantage a particular party or candidate (for example, if it is engaged in for other, ideological reasons).

Subclause (2) reflects the fact that some electoral offences are part of a course of conduct that may commence before a political party is formed or a candidate is nominated. The conduct relating to the offence that occurs prior to the party being formed or the candidate being nominated is within the ICAC’s jurisdiction.

14. **Meaning of *public body* and *public officer***

This clause defines the terms ‘public body’ and ‘public officer’. These terms are essential to confining the ICAC’s jurisdiction to the Territory public sector. Most types of improper conduct can only be investigated if they are engaged in by a public body or public officer. In addition to all bodies that are clearly public sector bodies, such as Agencies, public bodies include statutory bodies, the Legislative assembly, local government councils, courts and tribunals, bodies where the majority of members are appointed by the Administrator or a minister, government owned corporations, nursing homes, public hospitals, and universities. Public bodies also include private entities that are performing public functions on behalf of the Territory, or that are supported directly or indirectly by government funds or other assistance – this means that NGOs that are recipients of government grants can potentially be investigated by the ICAC.

The term ‘public officer’ primarily refers to persons who are members, officers, or employees of a public body. It also includes a minister, an MLA, a judicial officer, and officers appointed to statutory roles. Subclause (2) (f) extends the definition of public officer to persons to be engaged by a public officer to perform official functions. This includes electorate officers and ministerial advisors. Electorate staff are employed on contracts under the *Contracts Act* and perform official functions in relation to MLAs, who are public officers listed at subclause (2) (b). The contracts are issued by the Department of the Legislative Assembly. Ministerial Officers are employed on contracts under the *Contracts Act* by Department of the Chief Minister, and these comprise the staff of the Office of the Chief Minister and the Office of the Leader of the Opposition. Ministerial Officers are defined in the contract as ‘being a person employed on a fixed term contract in the personal service of a Minister or the Leader of the Opposition or Independent Member of the Legislative Assembly but does not include an Electorate Officer employed pursuant to Speaker’s Determination number EO2 of 2017.’

Subclause (3) excludes persons who are tasked with investigating the ICAC (Inspector, an Acting ICAC appointed to investigate the ICAC, their staff etc.) from being public officers, to ensure that there cannot be cross-investigations.

A number of terms used in this clause are defined at subclause (4), namely the definitions of a ‘court’, ‘nursing home’, ‘public hospital’, and ‘university’.

Part 2 – Establishment, Powers, Functions

15. Establishment of ICAC

This clause creates the statutory role of the ICAC. The appointment, powers, functions, and duties of the role are detailed throughout the Bill.

16. Functions

This clause defines the ICAC's functions.

Subclause (1) reflects that while conducting investigations form a substantial part of the ICAC's functions, conducting investigations is not an end in and of itself. The ICAC's functions therefore extend to a wider range of activities designed to deal with improper conduct. The ICAC is able to gather intelligence, develop and deliver education and training, audit or review practices, policies and procedures, make recommendations and give advice, make public comment, and refer matters as required. Protecting whistleblowers is also an essential part of the ICAC's functions.

Subclause (2) clarifies that the ICAC has jurisdiction to investigate all kinds of improper conduct, but is expected to primarily focus on matters involving corrupt conduct and serious anti-democratic conduct. It expresses the intention that the ICAC should refer matters that are not its primary focus to another appropriate entity, unless there is a good reason for the ICAC to deal with the matter. Referrals are dealt with more comprehensively at clauses 23-28 of the Bill. The term 'serious' in relation to anti-democratic conduct carries a common sense meaning.

Subclause (3) is directed particularly towards distinguishing when offences against the ICAC legislation are to be referred or investigated by the ICAC. Clause 9(1) (e) provides that improper conduct and hence the ICAC's jurisdiction extends to offences against the ICAC legislation, which notably includes retaliation against a whistleblower, failure to comply with a notice etc. Some of these offences may be appropriate to refer, and some may not, and the matters noted in subclause (3) are likely to be relevant for drawing this distinction.

Subclause (4) is a standard clause that clarifies that the ICAC has broad discretion as to how it carries out its functions, subject to any limitations imposed by the legislation.

17. Powers

This is a standard clause that ensures the ICAC is conferred with sufficient powers to carry out its functions.

18. ICAC to act in the public interest

This clause specifies that the ICAC must act in the public interest, and requires the ICAC to consider a framework of relevant considerations, which are detailed in Schedule 1 of the Bill. These relevant considerations include principles relating to fairness and impartiality, upholding the rule of law, separation of powers, cultural sensitivity, deterrence of improper conduct, avoiding prejudice to prosecutions, the impact of the ICAC's activities on the delivery of essential government services,

the need for the ICAC to target its resources most effectively, and public interest factors relevant to whether a matter should be dealt with in public or in private.

Subclauses 2 and 3 make clear that these factors are relevant to how the ICAC carries out its functions but do not, in and of themselves, create rights which give rise to any civil cause of action. They provide a framework for the ICAC and the ICAC's staff to exercise discretions under the Bill, and guidance to the courts if judicial review of administrative action by the ICAC is sought. They will also inform the Inspector's evaluation of the ICAC.

It should be noted that the ICAC must only consider the Schedule 1 factors the ICAC considers relevant. It is intended that the ICAC be guided but not rigidly bound by the framework of considerations in the Schedule. It is not intended that the Schedule create any presumptions, except with respect to the privacy of investigations. Clauses 19 and 61 also emphasise that the ICAC's discretion to determine which matters are pursued, prioritised, investigated, or referred is not to be subject to external control or review, unless the ICAC acts outside of its statutory powers.

19. Independence of ICAC

This clause provides that the ICAC alone may decide how it will carry out his or her functions (provided, of course, that the decisions are in keeping with the Bill and other laws). Even though there will be a Minister responsible for the ICAC Bill, the Minister will not be able to direct the ICAC to carry out its functions in a particular way, or to prioritise (or de-prioritise) particular investigations. A clause of this nature is standard in provisions establishing independent statutory authorities.

Part 3 – Identifying and dealing with improper conduct

20. ICAC to establish system for mandatory reporting

This clause provides that there will be a system under which public bodies and public officers are required to report improper conduct. The ICAC is to issue directions and guidelines specifying what must be reported and how. This must occur within 6 months of the commencement of the clause.

The clause gives the ICAC some discretion to determine who should be required to report and the process of reporting. For example, the ICAC may specify broad processes to apply across all bodies as a default, but different reporting processes for certain bodies that have particular needs, allowing for processes that fit better with the processes and functions of a given body. It may be appropriate to place reporting obligations only on senior persons, persons with certain responsibilities (eg. financial responsibilities), or persons with a certain level of training. More stringent reporting obligations could be placed for a period on bodies that have had identifiable issues or have higher risks of serious improper conduct. This flexibility will also allow the ICAC to adjust the reporting requirements if too many resources are being consumed with reports of limited value.

Subclause (2)(d) makes it clear that reporting obligations to the ICAC can exist concurrently with other schemes or legislative provisions that impose reporting obligations. For example, under the *Ombudsman Act*, written notice of police complaints are required to be given to the Ombudsman by the Police Standards Command (see s 65 of the *Ombudsman Act*). Subclause (2)(d) ensures the ICAC can still require reports of police corruption to be made to the ICAC, but the general flexibility in clause 20 of the Bill allows the ICAC to work out reporting procedures in conjunction with the Police Standards Command and the Ombudsman. This will allow these entities to work together to devise processes that reduce unnecessary administrative work involved in concurrent reporting obligations.

Legal or policy issues may exist in relation to any mandatory reporting regime for the Supreme Court and the Local Court. Currently, the Bill is drafted on an assumption that the ICAC can be relied on to determine what is, in fact, legally possible and what is practically necessary concerning the judiciary.

21. Audits and reviews

This clause permits the ICAC to conduct audits and reviews of public bodies and public officers. The primary purpose of such audits and reviews will be to gather intelligence to help the ICAC determine fruitful avenues for further inquiries and investigations. The audits and reviews must be for the purpose of identifying whether improper conduct has occurred, is occurring or is at risk of occurring. This clause facilitates the ICAC having an effective own-motion jurisdiction, because it does not require a report of specific improper conduct before an audit or review can be carried out.

An 'audit' implies that the body or officer's conduct is being compared to an agreed upon set of standards, and that data is gathered in line with pre-defined methodologies that would be recognised by professional auditors. An 'audit' is defined in the *Audit Act* to include 'the inspection, investigation, examination or review of accounts and systems'. A 'review' is a looser term that encompasses revisiting records of processes and decisions in order to identify and evaluate what occurred. It is intended that the ICAC can employ a broad range of methodologies to review or audit the actions of public bodies and public officers, and also that the ICAC is not limited to auditing for compliance with systems and accounting standards, but could conduct a review which (for example) explores the

background to the making of a particular decision. To this end, the ICAC has powers under clause 68 to be able to access documents and things in the possession of public bodies and public officers, and to compel public bodies and public officers to answer questions or provide information.

This clause is relevant to the implementation of Recommendation 19 of the Martin Report, that the ICAC be empowered to institute investigations on its own motion. Recommendation 30 of the Martin Report is that the ICAC possess a wide and unfettered discretion to undertake an investigation. It is designed to ensure the ICAC can obtain the information that would justify an own motion investigation.

The audit and review power also relates to one of the dot points of Recommendation 37 of the Martin Report, that the ICAC have the power to evaluate the practices, policies and procedures of a public sector agency and to report to the Assembly with recommendations. This particular recommendation references an audit power in the SA ICAC legislation. That audit power is for the purpose of doing more comprehensive review of the policies and procedures of public bodies in order to report to the Legislative Assembly, and does not enable audits of the Legislative Assembly or a judicial body for this purpose - see section 40(5) of the SA ICAC legislation. There are no limitations on the SA ICAC reviewing other independent bodies. In fact, s 7(1) (d) of the SA ICAC Act is explicit that it is a function of the SA ICAC to evaluate the practices, policies and procedures of inquiry agencies as well as other public bodies, and inquiry agencies are the Ombudsman, the Police Ombudsman, or a person declared by regulation to be an inquiry agency. A policy decision was taken that this broader comprehensive review function should not be one of the NT ICAC's primary focuses, given its size and resources. Instead, the audit and review powers of the NT ICAC should be a preliminary inquiry tool to implement own motions as outlined above.

As such, reporting to the Legislative Assembly is an optional outcome of an audit/review as opposed to a mandatory outcome as in SA. Not all audits / reviews will warrant being made available to the broader public, which is the likely outcome of providing a copy to the Parliament.

In recognition of the independence of the judiciary, the ICAC cannot audit or review the practices, policies or procedures of a court or judicial officer in relation to judicial functions (clause 21(2)). Further, the ICAC is obliged to take the importance of separation of powers and the independence of the judiciary into account when exercising its functions (see schedule 1).

22. Preliminary inquiries

This clause confirms that the ICAC has power to collect, receive, and investigate information that is reported to it concerning potential improper conduct. It also ensures that the ICAC can exercise powers to make inquiries to determine whether a matter can be referred, even if it has not yet been able to ascertain whether the matter meets the threshold for investigation by the ICAC. Together with clause 21, the ICAC is conferred with effective own motion powers to start inquiring into any matter, while clause 29(1) provides a threshold test for exercising the ICAC's more serious coercive powers.

23. Referral to referral entity

This clause allows the ICAC to refer a matter, before or after determining whether the ICAC has jurisdiction to investigate the matter. It is sufficient that the matter 'may involve improper conduct'. Subclause (2) specifies that matters concerning improper conduct by certain persons must be referred to certain limited entities. The limited bodies to whom matters can be referred reflect the

independence of the judiciary and of the Legislative Assembly. Special provisions are made for referrals concerning Police, given the sensitivity of investigations concerning Police misconduct and that existing oversight mechanisms exist for allegations about Police, particularly the oversight of the NT Ombudsman.

This clause also clarifies that the ICAC may refer matters in whole or in part to multiple appropriate entities, and subclause (5) provides that the ICAC may refer a matter to the DPP to seek an opinion or request a person be given an indemnity from prosecution.

There may be issues yet to be resolved about whether this clause should apply to the Northern Territory Civil and Administrative Tribunal.

24. Consultation prior to referral

This clause makes clear that the ICAC can conduct discussions concerning a referral prior to making a referral.

25. Information to be provided with referral

This clause makes clear that the ICAC is both empowered to share information to facilitate a referral, but also to withhold information where appropriate. In particular, withholding the original source of any information may be crucial to protect the identity of a whistleblower, and is consistent with the principles and provisions of whistleblower protection in Part 6 of the Bill.

26. Directions to referral entity

This clause enables the ICAC to oversee a matter that has been referred to ensure that it is properly dealt with. The ICAC may give directions to most referral entities as to how the matter is to be dealt with. For independent entities, the ICAC may require a report on what outcome was taken and the action of such outcomes. This enables the ICAC to ensure that matters are dealt with, and also to better evaluate whether particular entities are likely to deal with referrals appropriately. While the ICAC cannot compel an independent entity to take any particular action in relation to a referral, the ICAC retains the ability to investigate the matter itself and to make public comment in relation to whether a referral was dealt with. If an independent entity fails to investigate a matter it has been referred, the ICAC may decide this gives it good reason to investigate the matter itself, depending upon the seriousness of the matter and the ICAC's priorities and resources.

The Speaker and Deputy Speaker are excluded from independent entities that can be directed in order to preserve the principle of separation of powers, and because in practical terms the Speaker and Deputy Speaker are not in a position to carry out an investigation. The current appropriate body for an investigation would be the Privileges Committee, and it would be inappropriate for the ICAC to direct such a committee.

It is recognised that the Martin Report stated at [477] that: 'I recommend that the Speaker be under an obligation to carry out the investigation and to report to the Commission providing details of the investigation and the result. This would include reporting as to what, if any, action was taken following completion of the investigation. In this situation ... I recommend that the powers of the Commission to reclaim a matter and investigate or to require further investigation apply. In this way the public can be assured that MLAs do not receive any special treatment or protection from investigation and the appearance of independence from political and personal influences is

maintained with respect to matters involving MLAs.’ However, Recommendation 16 of the Martin Report also generally recommends that parliamentary privilege is maintained. An approach has therefore been adopted which places obligations on the Speaker while maintaining parliamentary privilege by providing that:

- the ICAC may investigate a matter even if it has been referred to the Speaker, so if the ICAC had good reason to investigate the matter (for example, it was not satisfied that an investigation into serious misconduct of an MLA had taken place), this could have the consequence of the ICAC determining to investigate the matter itself (see clause 29(2)(b));
- the ICAC may report about matters it has referred, resulting in public pressure for the Speaker or Legislative Assembly to account for what has happened to referred matters and address any concerns that improper conduct is not being adequately dealt with.

27. Referral entity may disclose information to ICAC

This clause ensures that a referral entity can communicate freely with the ICAC regarding a referral, irrespective of whether the referral entity would otherwise be bound to keep the information confidential, or restricted from disclosure by privacy laws. By including ‘potential referrals’, the clause permits information sharing between the referral entity and the ICAC in order to determine whether a matter is suitable for referral and what might happen if a referral occurred.

28. Withdrawal or suspension of referral

This clause allows the ICAC to require a referral entity to suspend or discontinue dealing with a referral. This could occur if the ICAC is not satisfied that a referral entity is dealing with a matter appropriately, or because the ICAC subsequently receives further relevant information which elevates the seriousness of the referred matter or otherwise places it in a context where the ICAC feels it is better placed to personally investigate the matter, or because it becomes clear that another body is already adequately dealing with the matter, or because information is received which suggests the substance of the allegations are untrue.

The ICAC cannot withdraw or suspend a referral in relation to an independent entity. However, if the ICAC was concerned that a matter referred to an independent entity had not been dealt with adequately, the ICAC could decide to commence its own investigation.

29. Power to investigate.

This clause sets out when the ICAC may commence an investigation. This refers to a formal stage in the ICAC’s processes of responding to improper conduct. When a matter is in the investigation stage, the ICAC has powers it can exercise for the purposes of the investigation beyond its standing powers. For example, it can require people to attend for compulsory examinations.

In order to allow an ICAC to investigate information on its own motion, an investigation does not require that a complaint be made, however this clause does require that there be some rational evidentiary basis for commencing the investigation. In particular it requires the ICAC to be aware of information that, if true, would tend to show that improper conduct has occurred, is occurring or is at risk of occurring. This broad test is framed to avoid the ICAC needing to make any premature decisions as to the credibility of sources, as such judgements may be difficult to make before a matter is investigated. Subclause (3) also clarifies that an investigation may be commenced when it is in possession of information which, if true, may be directly or indirectly connected with improper

conduct or be part of a course of activity involving improper conduct, even if the information does not itself amount to improper conduct. The threshold test is imposed to require that the ICAC has an evidentiary basis to exercise its very significant coercive powers.

To ensure that the ICAC is able to obtain the evidentiary basis to commence own motion investigations, the ICAC can at any time commence an audit or review under clause 21 in order to explore whether there is evidence available that would justify commencing an investigation. During an audit or review, the ICAC has access to premises of and information held by public bodies, and may also require public bodies or public officers to answer questions or provide information. However, in order to exercise the ICAC's more broad ranging powers to require persons to attend for compulsory examinations, or to inspect financial records of deposit holders (which may be private entities such as banks or pawn brokers etc.), the ICAC must commence an investigation.

30. Power to require information and documents for investigation

This clause empowers the ICAC to demand that persons answer questions or produce evidence. This power can only be exercised for the purpose of an investigation which has commenced under clause 29. Subclause (2) requires the ICAC to accord a person procedural fairness by informing them of the nature of the matters about which they will be asked questions or asked to produce evidence, although the ICAC can refuse to do so if providing this information would be likely to prejudice the conduct of the investigation or be contrary to the public interest. For example, the ICAC may be concerned that providing such information would lead to the witness manipulating or destroying evidence or interfering with witnesses. The ICAC may consider that providing such information is not in the public interest if it would reveal the identity of a whistleblower, or for some other public interest reason such as that it would risk the dissemination of highly sensitive government information, commercial in confidence information, or personal information.

Subclause (3) anticipates that this power will usually be exercised by issuing a written notice to a person, but that circumstances will arise where an oral response is required, in which case the requirement may be made orally. If a person is to be required to attend for questioning, a notice requiring such attendance can be issued under clause 32 (or, in the case of a public inquiry, clause 39).

Subclause (4) allows the ICAC to require information by given by way of statutory declaration.

Subclause (5) empowers the ICAC to seize evidence for a reasonable period of time, and to take copies or make extracts, but also requires the ICAC to allow the owner reasonable access to the item. What amounts to reasonable access and a reasonable period of time will depend on all the circumstances. For example, if the ICAC seized a computer system that a witness requires for his or her business, it might be reasonable for the ICAC to retain the system for long enough to make a verifiable copy of the hard drive, and then return to the equipment to the owner. It would probably not be reasonable for the ICAC to simply hold equipment that the owner regularly uses and needs if a copy that would be sufficient for future evidentiary purposes could be made and retained instead.

31. Power to inspect financial records

This clause enables an ICAC to inspect bank accounts and similar financial records for the purposes of an investigation. Many kinds of serious improper conduct involve the exchange of money, and financial records can be an important source of evidence to indicate the nature of a relationship, whether any improper financial benefits have been obtained, and whether a conflict of interest exists.

The ICAC must have a sufficient basis to commence an investigation, but then is able to inspect bank records for the purpose of investigating those allegations. The clause requires the ICAC to record why inspecting particular financial records is relevant to a particular investigation, which will enable the Inspector to review whether the ICAC is exercising this power appropriately.

32. Power to require person to attend for examination

This clause allows the ICAC to issue a notice which requires a person to attend for a compulsory interview, which is known as an ‘examination’. The person may be additionally required to bring documents or other evidence to the interview. The person is generally entitled to know the general nature of the matters about which the person is to be questioned. The ICAC has some discretion as to how much detail it provides the person as to the nature of the questions to be asked. In particular, the ICAC does not have to notify the person as to the nature of the matters about which the person is being questioned if an explanation about such matters would prejudice the conduct of the investigation (eg. may lead to the destruction of evidence or opportunity to prepare tailored answers), or would be contrary to the public interest (eg. may risk revealing highly confidential government information, or may risk revealing the identity of a whistleblower). Subclause (4) empowers the ICAC to require a witness who has attended for an examination to take an oath to answer questions truthfully, to answer questions, and to produce documents and other evidence.

33. Examination to be held in private

This clause provides that examinations are held in private. If the ICAC wishes to conduct what is in effect a ‘public examination’ (which would not be the norm), it must initiate a public inquiry under clause 37. Clause 39 allows the ICAC to compel persons to attend the equivalent of an examination for a public inquiry.

34. Legal or other representation

This clause sets the test for whether a person is permitted legal and non-legal representation if they are required to attend a compulsory examination. The intention is that while the ICAC has some discretion, if the proposed representative is a legal practitioner, the representative must be permitted to attend in most circumstances. Legal practitioners can help safeguard a person’s rights and are bound by strict professional duties. A request can be refused if the ICAC believes on reasonable grounds that the presence of the legal practitioner would prejudice the investigation or be contrary to the public interest.

The Martin Report discussed legal representation in the context of public hearings (see para [407]-[408]). Section 127 of the Vic IBAC Act deals with the issue where the IBAC may have good reason to refuse that a specific legal representative be present. The test in the Victorian Act has been used as a basis for clauses 34 and 42 of this Bill. Clause 42 sets out the test for whether legal representation is permitted during a public hearing, whereas this provision relates to examinations conducted in private.

35. Interpreters

This clause clarifies that while it is contemplated a witness who would be assisted by an interpreter may have an interpreter, there are circumstances in which the ICAC may refuse use of a particular interpreter. These include when the presence of the interpreter would prejudice the conduct of the

investigation or otherwise be contrary to the public interest. The ICAC is obliged under Schedule 1 to consider the need for ‘cultural sensitivity and the reasonable accommodation of persons with special needs’, however there can also be competing demands which make it difficult to use an interpreter. Evidence may need to be gathered as a matter of urgency and a suitable interpreter may be unavailable. Interpreters, particularly from small language communities, may have relationships with witnesses and subjects of investigations which may raise concerns about witnesses being intimidated or information leaking. While interpreters are often professionals or para-professionals who are trained to adopt professional standards and often successfully interpret in scenarios where conflicts arise, there is not always a trained interpreter available, or sometimes the conflict is such that it raises concerns for the witness or the ICAC despite the interpreter’s skills and qualifications. It is assumed that the ICAC will recognise the importance of using an interpreter where this is needed to obtain the most accurate and reliable evidence, and in particular to allow a subject of an investigation reasonable opportunity to obtain an interpreter so that the person may understand the process taking place and how it may impact them. Under Schedule 1, the ICAC is obliged to act fairly and impartially in carrying out an investigation.

36. Joint investigations

This clause empowers the ICAC to enter into agreements to conduct joint investigations with another entity. This may be appropriate where allegations span both corrupt conduct that the ICAC is best suited to investigate, and other kinds of conduct where another entity may have specialist expertise. For example, the ICAC could potentially carry out a joint investigation with a body like the Ombudsman, where the ICAC targets particular serious incidents of corruption, and the Ombudsman investigates the systemic and cultural issues that allowed the improper conduct to occur. In some investigations, the ICAC may wish to conduct an investigation jointly with the public body in which the improper conduct occurred. This may particularly be the case where the public body has an auditor or internal professional standards unit that could carry out much of the investigation and would bring detailed knowledge of the organisation.

The clause sets out some key matters that need to be considered and agreed upon in order to conduct a joint investigation, including respective responsibilities of the organisations, proposed timelines, and information sharing arrangements. It clarifies that it is expected that an agreement can be terminated with notice. Subclause (5) is intended to protect a future prosecution in the event that evidence was gathered contrary to the terms of an agreement or if a joint investigation agreement breaks down. During a criminal trial, evidence can be excluded on the basis it was unlawfully obtained, and subclause (5) is meant to clarify that mere failure to adhere to the terms of a joint investigation agreement does not make the gathering of evidence unlawful or inappropriate.

37. Public inquiries

This clause empowers the ICAC to hold a public inquiry. A public inquiry can only be held ‘for an investigation’, which means it must be an appropriate way of conducting an investigation in the ICAC’s view. The decision whether a public inquiry is an appropriate way to conduct an investigation is to be determined in accordance with clause 5 of Schedule 1. This provides that matters should be dealt with in private unless it is in the public interest to do otherwise, and sets out a range of relevant considerations for the ICAC to take into account.

Schedule 1 factors that tend in favour of conducting a public inquiry include:

- the desirability of the public sector being open and accountable to the public;

- the benefit of exposing improper conduct to public scrutiny;
- if allegations of improper conduct are already substantially in the public domain and raise issues of continuing public interest;
- the educational value and benefit to research and policy development of sharing details of matters about which the ICAC has particular knowledge (although this factor may be more relevant to releasing a public report rather than conducting a public inquiry).

Schedule 1 factors that tell against a public inquiry include:

- avoiding prejudice to current and possible future prosecutions;
- the impact of the ICAC's activities on investigations by law enforcement agencies, current and possible future legal proceedings, or the ability and capacity of the public sector to carry out critical or front-line services;
- if allegations of improper conduct (which may only be allegations and not be true) are not yet a matter of public knowledge or raise limited wider issues of public interest;
- the risk that a person may suffer undue hardship, including undue prejudice to the person's reputation; and
- protecting the identity and wellbeing of whistleblowers and other persons who have assisted the ICAC.

The ICAC may also take into account any other circumstances it considers relevant, including prioritising resources, and any views expressed by persons who would be affected by a decision whether to handle a matter in private or public.

A public inquiry requires a public announcement as to the general scope and purpose of the inquiry, and the time and place of the inquiry. While it is possible that an investigation may be able to be dealt with almost entirely through a public inquiry, it is also possible that a larger investigation has one or more 'public inquiry phases' to address particular allegations within the context of that larger investigation. A public inquiry may involve things such as questioning witnesses, and hearing submissions concerning evidence before ICAC or recommendations that the ICAC may wish to make.

38. Public inquiries generally to be open to the public

This clause clarifies that the default position for a public inquiry is that it be open to the public, notwithstanding that investigations are usually conducted in private.

39. Power to require attendance

This clause imports the powers in clause 32 (dealing with requirements to attend) with the necessary modifications. Essentially, it should be read as repeating clause 32, but as though the word 'examination' is replaced with the words 'public inquiry'. This empowers the ICAC to require a person to attend and give evidence on oath.

40. Appearance generally

This clause gives the ICAC broad discretion to determine that certain persons or bodies may participate ('appear') in a public inquiry. The ICAC may allow persons or bodies to participate where the ICAC considers this 'appropriate'. Hence, it would be possible for a community group with an interest in the outcome of an investigation but no legal standing in the usual sense to be allowed to

appear. However, the ICAC may need to limit who is able to appear at a public inquiry in order to keep an inquiry focused and avoid consuming undue resources, bearing in mind the purpose of the inquiry and related investigation. A person who appears may make submissions and, with the ICAC's approval, examine or cross-examine witnesses.

41. Right of response if adverse allegations made

This clause ensures an element of natural justice or procedural fairness to a public inquiry. A public inquiry does not necessarily result in any adverse outcome to a person's legal rights, which can limit their ability to rely on natural justice to protect themselves. Merely revealing the ICAC is investigating allegations in a public inquiry may result in substantial reputational damage. If such allegations are made against a person, the ICAC must have the person or body a reasonable opportunity to respond to the allegations. It is up to the ICAC whether the response is to be given in person or orally.

42. Legal or other representation

This clause sets the test for whether a person is permitted legal and non-legal representation if a person is a witness or otherwise appears at a public inquiry. It mirrors clause 34 (which deals with investigations that are not public).

43. Interpreters

This clause mirrors clause 35, but for public inquiries.

44. Directions for private hearing and non-publication

Even though the ICAC may deem it appropriate to conduct a public inquiry, circumstances may arise where evidence or submissions concern a topic which is particularly sensitive. In addition, the ICAC may wish to hold a 'closed session' (see clause 78(4)) in which arguments can be made about the application of privilege, or to discuss whether a certain line of questioning would be within the scope of the inquiry, similarly to the concept of a *voir dire*.

This clause also provides the ICAC with the power to make directions concerning non-publication, and the power to exclude particular persons from a public inquiry, even though the inquiry may generally be open to the public.

45. General report

Clauses 45 to 56 set out a framework for the ICAC to make reports, provide briefs of evidence, and public statements concerning relevant matters.

Under clause 45 the ICAC can make broad reports on matters of concern that may not arise out of a particular investigation. For example, the ICAC can report on the results of an audit or review, on systemic issues that appear to be occurring across government, or to raise issues about matters that may be impacting the ICAC's ability to carry out its functions.

46. Publication of general report made to Speaker

This clause applies when a general report under clause 45 is made to the Speaker, as opposed to being privately made to a public body or public officer. It provides the process for making general

reports public. The Speaker is required to table the report within 6 sitting days. In the event that the ICAC considers the report warrants more urgent publication (as 6 sitting days could, in some cases, be a period of up to approximately 2 months), the ICAC may recommend that the Speaker make the report publicly available immediately, and the Speaker is able to publish the report, which then attracts parliamentary privilege. This provision is modelled after a similar provision in the NSW ICAC Act.

47. Investigation report

This clause allows the ICAC to make reports on the findings and progress of an investigation. An investigation report may optionally include recommendations within the meaning of clause 52, although recommendations may also be made separately from an investigation report. An investigation report may essentially offer conclusions on whether improper conduct has occurred, and hence includes an obligation that due process be followed by requiring that a person be given opportunity to respond to adverse material and to include a fair representation of the response in the final report.

An investigation report is distinct from a brief of evidence in the following ways:

- an investigation report will likely only summarise the evidence rather than include it;
- an investigation report is likely to be a narrative with conclusions;
- an investigation report must be consistent with an obligation to seek a response to adverse material and fairly represent that response; and
- if the investigation report is to be delivered to the Speaker or Deputy Speaker (and hence be tabled publically) it is not to contain answers given in coercive interviews but may contain answers given in a voluntary context (see clause 56 and clause 79(2) (b)).

48. Brief of evidence

This clause allows the ICAC to provide a brief of evidence to an appropriate body for the purpose of pursuing criminal or disciplinary action against a person. Clause 56 does not apply to a brief of evidence, meaning that it may contain evidence obtained during coercive examinations.

49. Public inquiry report

This clause requires the ICAC to provide a report on a public inquiry within three months of the conclusion of the public inquiry. This may be similar to an investigation report, or it may be more appropriate to provide a status update on the progress of the matter. Clause 56 limits the material that can be included in this report, although it should be noted that clause 56 permits material that is already in the public domain to be included, which may be the case with answers given at a public inquiry, even where answering questions was compulsory. Additional public inquiry reports can be provided, which may be appropriate if the report within three months is only a status update, or only dealt with some aspects of the matters explored by the public inquiry. Public inquiry reports are given to the Speaker, who is obliged to table the report the next sitting day after it is received.

Clause 49(3) requires the ICAC to refrain from making ultimate findings about a person's culpability which might interfere or conflict with a criminal or disciplinary process. Questions of whether a person should be found guilty of an offence or disciplinary matter are inherently questions that must

be decided by the correct process—eg. trial by jury, or a relevantly constituted disciplinary panel limited to certain evidence. The ICAC’s role as an investigatory body is to unearth relevant evidence to allow such processes to operate effectively, not to usurp the role of those bodies. Criminal and disciplinary processes have specific safeguards which take into account that their focus is to make decisions that have severe consequences for individuals, including potentially deprivation of liberty. Similar provisions are found in equivalent legislation (see for example section 74B of the NSW ICAC Act, and section 162(6) of the Vic IBAC Act).

50. Report to Minister concerning referral

This clause provides a way of escalating a matter if a referral entity has not adequately dealt with a referral. The ICAC can escalate the matter to the appropriate Minister for that public body or public officer, or otherwise to the ICAC Minister.

51. Report to Assembly concerning referral

This clause provides that if a matter has been referred to a Minister under clause 49, and the ICAC takes the view that a referral has not adequately been dealt with, the ICAC may further escalate the matter to the Legislative Assembly. This is done by providing a copy of the report to the designated Legislative Assembly Committee (or, in the absence of such a Committee, the Speaker). The report must be tabled by the Committee or the Speaker within 6 sitting days. Note that the ICAC also has the ability to withdraw a referral under clause 28 (if the referral entity was not an independent entity), or can simply commence its own investigation into the referred matter under clause 29.

52. Public statements

This clause makes it clear that despite the provisions of the Act that emphasise privacy, it is appropriate for the ICAC to make certain kinds of public statements. This will assist the ICAC to engage in reasonable, limited, public statements to carry out its role and functions, including explanations of its roles and functions. The list is limited because the intention is for the ICAC to avoid as much as possible becoming engaged in public debates about the merits of its activities and recommendations, which might lead to the ICAC becoming politicised or create a perception that it has become politicised.

53. Recommendations

This clause provides that the ICAC can make recommendations in relation to improper conduct. Recommendations can be made at any time—they are not contingent on completing an investigation, and indeed may be a speedier and more effective alternative to conducting an investigation, if the problem can be identified and the public body is already willing to address it.

The ICAC cannot compel a public body to follow recommendations, however, failure to adequately implement the recommendations or a suitable alternative can trigger an escalation process that can ultimately result in public criticism, so there is an incentive for a public body to follow the recommendations or be satisfied it has a defensible basis for not following the recommendations.

54. Dealing with recommendations

For the purpose of ensuring recommendations are followed up, ICAC may give note to public bodies and officers to provide information about the steps, if any, take to implement recommendations – and seek reasons for not taking the necessary steps. If ICAC is not satisfied with the response it can refer the issues to the responsible Minister. If the matter is already at Ministerial level, the ICAC can skip clause 54 and go to clause 55.

55. Report concerning recommendations

This clause provides that if the responsible Minister has failed to respond to the ICAC's satisfaction, the ICAC may make a report to the ICAC Minister which the ICAC Minister must table in the Legislative Assembly within 6 sitting days.

This clause applies even if the responsible Minister *is* the same person as the ICAC Minister, because the ICAC may wish to provide a slightly different report under subclause (3) in view of the fact this report will be tabled and also may need to be amended to reflect any response from the responsible minister provided under subclause (1). For example, content may need to be excluded in accordance with clause 56.

56. Certain reports and public statements not to contain inadmissible material

This clause limits the use that can be made of information obtained due to the abrogation of the privilege against self-incrimination, in order to better protect the integrity of any related criminal, civil, or disciplinary proceedings that may result. It does not prohibit such information being passed privately to a relevant body for further investigation.

The purpose of subclause (2) is to confirm that subclause (1) does not prohibit *Jones v Dunkel* type inferences being drawn from a party's inexplicable failure to provide relevant evidence.

It should be noted that if evidence cannot be used in criminal, civil, or disciplinary proceedings, the benefits of its inclusion in a public report are extremely limited, and such material carries a high risk of unwarranted prejudice to a future proceeding or reputational damage. These are matters that the Martin Report considered should tell against handling a matter in public. The privilege against self-incrimination is abrogated during an investigation as a tool to help unearth the relevant evidence, but nothing further can be done specifically against a person unless derivative evidence supports taking that course of action.

Clause 56 does not prevent ICAC from making recommendations for remedying improper conduct generally in a report, if this can be done without identifying the inadmissible material. The material can still be referred to in a general or de-identified way and systemic changes can be recommended. The ICAC could, for example, identify in a public report the importance of having particular fraud controls on a particular system without revealing information prohibited by clause 56.

Clause 56 applies to reports made under clause 47 to the Speaker or Deputy Speaker, but not to reports provided to other responsible authorities. The reason for this is the publicity inherent in passing a report to the Speaker or Deputy Speaker. For other public officers, an investigation report is not made publicly, but instead is passed to a relevant authority where any concerns about their conduct may trigger a disciplinary process.

57. Rules of evidence do not apply

This is a standard clause for this kind of body that allows the ICAC to consider evidence that would not be technically admissible in court, and to give that evidence the weight that the ICAC considers appropriate.

58. Attendance of persons in custody

This clause makes it clear that the ICAC can compel persons in custody to give evidence, and that arrangements must be made that enable a person in custody to attend before the ICAC to give evidence.

59. Order for surrender of passport

This clause enables the ICAC to apply to the Supreme Court for an order that requires a person to surrender their passport. This power is intended to assist in preventing a relevant witness from fleeing the jurisdiction before they can be questioned by the ICAC, and the order can only be applied for when there are reasonable grounds to presume this may occur. Given the significant curtailment of freedom of movement involved, orders can only be issued for a period of one month, and only for up to three months in total.

60. Injunction to refrain from conduct pending investigation

This clause empowers the ICAC to seek an injunction from the Supreme Court to prevent a person from acting in a way that will obstruct an investigation.

61. Exclusion of certain injunctive remedies

This clause prevents a person from obtaining an injunction that would force an ICAC to investigate a matter, to discontinue investigating a matter, or to refer a matter. The clause helps preserve the ICAC's independence.

62. Restriction on access to ICAC premises and protected ICAC information

This clause ensures that the ICAC's premises and information are adequately secure from interference from third parties. The ICAC's premises can only be accessed by consent of the ICAC or by means of an order made by the Supreme Court.

Part 4 – Powers

Note that powers under this Part are exercisable by an ‘authorised officer’, meaning a person appointed under clause 128 by the ICAC to be able to exercise such powers (typically, an investigator working for the ICAC).

63. Power to enter premises of public body or officer

This clause empowers an authorised officer to enter the non-residential premises of a public body, whether or not an investigation has commenced. For example, the ICAC may wish to exercise this power to conduct an audit or make preliminary enquiries, or to follow up on the extent to which recommendations have been implemented or a whistleblower is being protected. If an authorised officer wishes to enter private premises or residential premises of a public body, it must do so using clauses 64 or 65.

64. Power to enter other premises

This clause allows an authorised officer to conduct searches of private or residential premises by consent of the owner or occupier or under the authority of a clause 65 search warrant. It requires the authorised officer to prove their identity by means of an identity card. Clause 129 of the Bill deals with issuing identity cards.

65. Search warrants

This clause empowers an authorised officer to apply for a search warrant. Search warrant applications can be made to a justice of the peace (but noting that section 6 of the *Justices of the Peace Act* provides that Supreme Court Judges, Local Court Judges and various court officials are deemed to be justices of the peace). An application for a search warrant must:

- specify the kind of improper conduct suspected;
- be accompanied by evidence on oath that satisfies the JP there are reasonable grounds for believing there is evidence of that kind of improper conduct on the premises.

This is a similar threshold test to the test in the *Police Administration Act*.

Search warrants must be executed within 30 days of the date on which they are issued.

66. Obtaining warrant by telephone or other electronic method

This clause provides a process, similar to the process in the *Police Administration Act*, by which a warrant can be granted remotely. For example, a warrant could be granted via telephone or other electronic method, which is particularly useful if a warrant needs to be granted urgently and the authorised officer is in a remote location.

67. Entry on Aboriginal land

This clause empowers an authorised officer to enter Aboriginal land without a permit if that is necessary or convenient to perform a function under the Act. Many public bodies in the Territory are located on Aboriginal land or can only be accessed by crossing Aboriginal land.

68. Powers of authorised officers while on or about the premises

This clause provides a list of things that an authorised officer is empowered to do while on premises in accordance with this part (eg. in accordance with clauses 63 or 64, or in accordance with a search warrant). It includes an offence to contravene a direction of an authorised officer. As with a number of similar offences in the Bill, this is a strict liability offence that carries a maximum penalty of 100 penalty units (currently \$15,400).

69. Procedure for retention notices

This clause allows the ICAC to place restrictions on the use and movement of an object without actually seizing the object. This may be appropriate if an object is of a shape and size it cannot be immediately seized, and/or if the ICAC trusts that the owner or person in control of the object is likely to comply with the retention notice. It includes an offence to contravene a direction in relation to a retention notice. Similarly to equivalent offences in the existing *Public Interest Disclosure Act*, it is an offence that carries a maximum penalty of 100 penalty units (currently \$15,400).

70. Search of persons

This clause allows a person on or about the premises entered by means of a search warrant to be searched by the ICAC, including a search of outer clothing, but does not authorise a more intimate search.

71. Power to require verification and further information and documents from persons providing information to the ICAC

This clause clarifies that the ICAC has a general power to ask follow-up questions in relation to information provided to the ICAC, and require confirmation of the reliability of information by means of requiring a statutory declaration. Making statutory declaration necessarily requires that a person give careful thought to the information they are provided and its accuracy. This power is an important tool to deter vague and misleading reports of improper conduct, and to enable the ICAC to direct its resources most effectively.

Subclause (1) (b) gives the ICAC the power to compel a whistleblower to provide follow-up or confirmatory evidence. In determining whether to commence an investigation, it will be useful for the ICAC to be able to require a person who makes a report of improper conduct to confirm the allegations by means of a statutory declaration, and to provide supporting documentation. This subclause enables this to occur prior to commencing an investigation, even if the whistleblower is not a public officer who can otherwise be required to provide such information.

72. Power to require information and documents from public bodies and officers

This clause empowers the ICAC to require a public officer or public body to provide information and documents. This power can be exercised in circumstances other than an investigation, for example to perform an audit or review in accordance with the Bill.

73. Arrangements for access to confidential information

This clause authorises information sharing between a public body or public officer and the ICAC, including ongoing access to database systems. The public body is able to provide such access despite otherwise having confidentiality obligations with respect to databases and systems. This could enable the ICAC to be granted direct access to search government information systems where this would be appropriate, if the relevant public body or public officer agrees.

74. Power to direct public body or officer to refrain from action

This clause empowers the ICAC to direct a public body or public officer not to take an action if it would obstruct the ICAC or prejudice a future investigation. Whereas clause 60 is an application for an injunction which can be sought in relation to any person, directions can only be issued under clause 74 to public bodies or public officers in their capacity as public bodies and public officers. A clause 74 notice does not require court approval. Intentional non-compliance with a notice issued under this section is an offence that carries a maximum penalty of 2 years imprisonment and/or a fine of up to 400 penalty units (\$61,600).

Part 5 – Confidentiality and Privilege

This Part sets out the circumstances in which various usual privileges and obligations of confidentiality are abrogated or modified in relation to the operation of the ICAC.

75. Definitions

This clause defines some terms used in this division: closed session, open session, and representation. See the notes in relation to clause 4 for a discussion of terms defined in the ICAC Bill, particularly the terms relating to public inquiries and privilege

76. Confidential or privileged information

This clause removes certain obligations of confidentiality and secrecy, and certain privileges, which might otherwise restrict the ICAC from obtaining relevant evidence. Some key results of this clause include that:

- a person can give information to the ICAC even if such information is otherwise confidential, meaning that even if information is subject to a contractual confidentiality agreement or is commercial-in-confidence, it can be given to the ICAC;
- the common law concept of public interest immunity is codified so that:
 - o most government documents have to be produced to the ICAC, even if they are confidential – this cannot be the subject of legal argument;
 - o in accordance with the Westminster tradition and consistent with other jurisdictions and the Martin Report’s Recommendations, Cabinet documents cannot be obtained, however:
 - this does not exclude communications with Ministers unless the communications relate to Cabinet business;
 - the test is framed so that documents cannot be excluded by simply wheeling them into a Cabinet meeting – the information must be about the decisions, proceedings, or deliberations of Cabinet;
 - o confidential communications among Australian governments cannot be obtained, as this risks intruding on the activities of the Commonwealth and other jurisdictions; and
- client legal privilege (legal professional privilege) can be claimed by individuals but not by public bodies.

The exclusion of Cabinet documents is consistent with both the Martin Report and all other jurisdictions. Cabinet documents are protected by public interest immunity, a position which was recommended by the Martin Report. However, rather than applying the common law of public interest immunity, this clause provides a statutory test that codifies that test. The intention is to protect those classes of documents which are clearly protected by public interest immunity, but to avoid the resources involved in litigating public interest immunity over a vast array of different situations where application of the common law test is more subjective. The simple categories here are justifiable. The documents excluded by subclause (2) would not be obtained under the common law test, but a range of other documents over which there may otherwise be subject to complex legal argument (eg. documents which could be argued to inhibit ‘frankness and candour’ generally if released) will be unquestionably available to the ICAC. The categories used in subclause (2) closely parallel some of the key protected classes of information in the *Information Act*.

Subclause (3) provides that while the ICAC has full access to matters over which the Territory would be able to claim client legal privilege, it must not make that information available to the public unless necessary to explain or support a finding of improper conduct. This represents a balancing between the ICAC's need to have the maximum information available for an investigation, and protecting the Territory's legal interests. If the privileged information does not demonstrate improper conduct, the ICAC can inspect it, but must keep it confidential.

77. Client legal privilege

This clause makes it clear that a witness can claim rely on client legal privilege (also known as legal professional privilege) in most circumstances. Client legal privilege is removed by clause 76(1) (c) only when the 'person' who holds the privilege is the Territory. That is to say, the Territory's legal advice must be disclosed to the ICAC, but legal advice of individuals and private entities remains protected. Clause 77 also protects legal advice obtained by a person in their capacity as an individual in relation to their conduct as a public officer (eg. if a public officer seeks personal legal advice in relation to allegations they have behaved improperly while working as a public officer, this legal advice remains privileged and does not have to be provided to the ICAC). Note that the meaning of 'witness' is defined in clause 4, and is a broad term referring to any act of providing information for an investigation, not just giving testimonial evidence.

78. Privilege against self-incrimination

This clause abrogates the privilege against self-incrimination, subject to some safeguards and exceptions. The privilege is not abrogated in relation to offences that the witness is currently charged with, as this would offend the 'companion principle' and risk interfering with a court process. The abrogation is also more limited during the open session of a public inquiry, given the potentially enormous reputational damage and prejudice to subsequent criminal proceedings that would be involved in answering such questions in such a forum. In an open session of a public inquiry, a witness only has to answer questions that might incriminate them if the answers would be materially relevant to the alleged improper conduct that is the subject matter of the inquiry.

For example, suppose the ICAC is investigating allegations of bribery of a public officer, and a witness is being questioned about the event where the bribe was offered and taken. At this event, suppose that various persons including the witness were consuming illegal substances. The witness could refuse in the open session to answer questions that would incriminate them in relation to their own illicit drug use, as this is not the subject matter of the inquiry. The witness would be obliged to give a complete account, including of the illicit drug use in a closed session, however the answers in relation to the drug use would be unlikely to become public and could not be used as evidence against the witness if they were then charged with possession of the illicit drugs (see clause 79). The intention is to given the ICAC the tools it needs to investigate improper conduct but in a way that interferes as little as possible with the general operation of the criminal law.

79. Subsequent use of representations made by witness

This clause limits the extent to which evidence gathered through abrogation of the privilege against self-incrimination can be used in a way that would infringe on basic individual rights, but permits use of 'derivative evidence'.

Under clause 79, adverse admissions made under coercive questioning are not admissible in that disciplinary process, unless those admissions are already in the public domain.

The purpose of abrogating the privilege against self-incrimination is not to allow forced admissions to be used in a disciplinary, civil or criminal proceeding. It is to enable derivative evidence to be located and avenues of enquiry to be fully explored, and it is the derivative evidence that can be used in a subsequent proceeding. Hence it is consistent that derivative evidence, but not the coercively obtained evidence, is made available for public consideration with respect to the actions of MLAs.

Subclause (1) limits the use that can be made of answers given in response to the ICAC's compulsory questions. This is an important safeguard when the privilege against self-incrimination has been abrogated. Together with the other subclauses in this clause, it confirms 'direct use immunity'. Not only does this clause prohibit the evidence being used in various proceedings against the witness, when read together with other clauses in the Bill, such evidence must be excluded from public reports, unless the information is already in the public domain.

Subclause (2)(a) provides an exception to subclause (1) where a witness produces a document or other object of real evidence that was not created for the purpose of providing testimony to the ICAC. That object or document can then be used in subsequent proceedings, even if it was part of making a representation to the ICAC, such where business records or a diary note is presented as an attachment to an affidavit. However, what the witness told the ICAC about the document or object (such as the affidavit itself) cannot be led as evidence against the witness in a subsequent proceeding. Subclause (3) further clarifies that if a document was copied in order to be given to the ICAC, the question of whether it has 'come into existence' to give evidence to the ICAC is to be determined by when the original came into existence, not the copy. Hence, if a person copies their business records and annexes them to an affidavit to the ICAC, subclauses (2) (a) and (3) read together permits these annexures to be used in subsequent proceedings.

Subclause (2)(b) also allows the ICAC to proceed by way of giving a witness a caution that makes it clear they are not required to answer questions, in which case subclause (1) does not operate because the evidence has not been coercively compelled. This will be particularly useful if the ICAC conducts a joint investigation with Police, as the usual rules for Police concerning cautioning witnesses in relation to offences can be applied if appropriate (although care would need to be taken to do this thoroughly to avoid later questions of voluntariness arising). It will also enable the ICAC to seek a voluntary response to an investigation report, and make use of the voluntary response in that final, published report. Read in conjunction with clause 56(3), it allows the ICAC to give a person being investigated a chance to comment on a near-to-final report, and then draw a negative inference if no exculpatory explanation is offered, when such an explanation would be expected if it existed, similar to a *Jones v Dunkel* inference.

Subclause (4) clarifies that subclause (1) does not provide 'derivative use immunity', meaning that evidence given under compulsory examination can be used as intelligence to inform further investigation, and evidence located as a result will be admissible (or, at least, it will not be inadmissible as a result of subclause (1)).

Subclauses (5) and (6) read together provide a further safeguard against abuse of the ICAC's powers to conduct compulsory questioning: admissions concerning minor offences that are not themselves improper conduct and that don't raise issues of risks to health and safety cannot be passed on to other authorities for further investigation or scrutiny. The ICAC has the power to conduct coercive questioning because it is important and necessary to effectively investigate improper conduct, but it is not intended to abrogate the

privilege against self-incrimination any more than necessary to serve that purpose. However, in the event that a witness confessed to a major offence or a public health and safety issue, it would not be appropriate for the ICAC to sit on this information. Accordingly, communication of the information to an appropriate authority is permitted, which will allow for it to be used as intelligence to take action to investigate the offence or address the health and safety issue.

80. Parliamentary privilege

This clause clarifies that the principle of parliamentary privilege continues to apply, but that certain activities are not to be construed as interfering with parliamentary privilege. In particular, if an allegation concerning an MLA has been referred to the Speaker or Deputy Speaker, the ICAC remains free to pursue its own investigation into the allegations if this would otherwise be appropriate.

81. Definitions

This clause defines some terms used in this division: claimant, claimant's representative, Clerk, item, privilege, proper officer, and secured item. See the notes in relation to clause 4 for a discussion of terms defined in the ICAC Bill, particularly the discussion of terms concerning privilege.

82. Meaning of the subject of privilege

This clause clarifies the meaning of the term 'privilege' for the purposes of the Bill, since there might otherwise be some ambiguity as to whether certain immunities were privileges. It is an exhaustive definition of the meaning of the term within the Bill. It is relevant to consider the applicability of claims of privilege to the ICAC in light of this clause, and also clause 57 which specifies the ICAC is not bound by the rules of evidence, and clause 76(1) (a) which generally removes the requirement to adhere to secrecy and confidentiality laws.

83. Notice of potentially privileged material

This clause identifies some action the ICAC can take to preserve evidence that may or may not be the subject of privilege. It clarifies that the ICAC can seize and/or copy such evidence, so long as the potential privilege is not infringed (for example, the material is seized but not viewed). This allows evidence such as a computer or the contents of an email account to be seized and held so as to prevent destruction of the evidence, but without prematurely revealing that an investigation is on foot.

At the point where the ICAC intends to inspect the material, consideration must be given as to whether privileged material is likely to be encountered. For example, if an authorised officer intends to view an email account, action might be taken to ensure that emails between a person and their solicitor are not viewed, or emails marked 'Cabinet in Confidence' are not viewed. If the authorised officer has reason to believe a certain document or thing is likely to be subject in whole or part to privilege (but may not be in whole or in part), the authorised officer can notify the person who would claim the privilege that they seek access to the potentially privileged content. The person then has the opportunity to provide non-privileged content, and defend their claim that the content is privileged if the ICAC does not accept this claim.

With respect to parliamentary privilege, even seizure of documents requires notice to be given. This provision is designed to err on the side of avoiding infringing the principle of separation of powers,

as such action would create a risk that an authorised officer doing their job in good faith could inadvertently end up being in contempt of the Legislative Assembly. It is also possible to identify in advance a representative for matters subject to parliamentary privilege, whereas other kinds of privilege may be held by a variety of persons and representatives.

It is noted that in determining the appropriate process for an investigation, the ICAC is required to have regard to the matters in Schedule 1, which include ‘not interfering with an individual’s rights, privileges or privacy, beyond what is reasonably necessary to carry out the ICAC’s functions effectively’.

84. Process for dealing with claim of parliamentary privilege

This clause allows for the ICAC and the Legislative Assembly to agree upon a preferred process for handling materials that are subject to parliamentary privilege. If such an agreement is in place, an authorised officer must proceed in accordance with the agreement.

85. Privilege claims generally

This clause provides a default process for handling evidence that may be subject to parliamentary privilege if no other process has been agreed in accordance with clause 84. It also provides the process for dealing with evidence subject to other kinds of privilege (eg. client legal privilege).

At the point an authorised officer intends to seize an item that is subject to parliamentary privilege, or inspect or view an item that is likely to contain material that is otherwise the subject of privilege, it must notify an apparent claimant of the privilege (clause 83).

If a claim of privilege is asserted, the authorised officer must stop dealing with the document or thing. However, if the authorised officer believes that privilege is being wrongfully claimed (that the privilege claim could not be established in fact and law), then the authorised officer can initiate a process to resolve the dispute. This process involves securing the item and providing it to the Supreme Court. Items in electronic form may be copied, since it would be impracticable to remove server equipment and the like.

86. Application to Supreme Court to determine privilege

This clause sets out the process for making an application to resolve a question of privilege after a secured item is provided to the Supreme Court in accordance with clause 85.

In most cases, the onus is on the person seeking to claim the privilege to lodge an application to establish that privilege. If no application is made within 7 days, the proper officer of the court must give the item to the ICAC. A failure to make an application does not waive the privilege over privileged material, but it does authorise the ICAC to view the material to the extent necessary to determine whether the material is privileged. Where the material is privileged, that privilege continues to apply and the ICAC cannot use the privileged part of an item without the consent of the claimant. This ensures that a person who does not have the resources to make an application to the Supreme Court is not ‘forced’ to waive their privilege, but ensures that the ICAC can continue to access non-privileged evidence and deal with spurious claims of privilege.

In the case of parliamentary privilege, the onus is on the ICAC to make the application within 7 days. The Clerk of the Legislative Assembly is by default able to appear as a representative of the

Legislative Assembly with respect to claims of parliamentary privilege. If no application is made, the proper officer must return the item to the representative of the Legislative Assembly (who is, by default, the Clerk).

87. Determination of privilege claim

This clause provides that the Supreme Court is to determine a claim of privilege made under clause 86. It contemplates that a document may be privileged in whole, in part, or not at all. The Supreme Court cannot waive a privilege that exists. Its role is to determine, as a question of law and fact, whether the claim of privilege has been correctly made. It also provides an incentive not to mishandle potentially privileged evidence in the form of the offence in subclause (7). This offence carries a maximum penalty of 100 penalty units (\$15,400) or imprisonment for 12 months. The person has to deliberately engage in an action that results in mishandling the evidence, and be reckless as to the fact that the action could result in mishandling the evidence.

Part 6 – Whistleblower protection

88. Whistleblower protection principles

This clause provides guidance for interpreting the Bill in order to ensure it furthers its whistleblower protection functions. It clarifies the role of the ICAC and public bodies in protecting whistleblowers, emphasises the importance of confidentiality to whistleblower protection, and notes the common law model litigant principle should inform how related litigation and disciplinary processes are handled.

89. Meaning of protected action

This clause defines the term ‘protected action’, which means reporting improper conduct in accordance with this Act or otherwise assisting the ICAC.

90. Meaning of protected communication

This clause defines the term ‘protected communication’, which means reporting improper conduct in accordance with this Act. Making a protected communication is a kind of protected action as defined by clause 89. Essentially, a whistleblower is a person who makes a protected communication. Under the *Public Interest Disclosure Act*, the equivalent to a ‘protected communication’ is a ‘disclosure’.

Subclause (1) clarifies that the communication is only a protected communication if it is made to certain persons or bodies, including ‘nominated recipients’, who are persons designated by public bodies to accept protected communications.

Subclause (2) clarifies that the communication is only a protected communication if it is about certain subject matter. Generally, the communication must tend to show that improper conduct has occurred, is occurring, or is at risk of occurring. This is a relatively low bar. There is no restriction, for example, on reporting hearsay information or credible rumour. Further, subclauses (2) (b) and (2) (c) broaden the content of a protected communication to include information that would assist the ICAC to perform the ICAC’s functions or would otherwise assist in the administration of or achieving the objects of the Act.

Subclause (3) clarifies that a disclosure's validity is not affected by matters such as whether the protected communication is made orally or in writing, whether it is made anonymously, or whether the person states that they are making a protected communication. However subclause (4) provides that subclause (3) can be varied by the ICAC's guidelines for mandatory reporting issued under clause 20.

91. Declaration of protected communication

This clause provides the ICAC with the power to declare an action that was not a protected communication to be treated as a protected communication. The definition of what is and is not a protected communication is quite technical, and it is anticipated that sometimes people will honestly try to report what they believe is improper conduct, but report in a way or including details that do not meet the definition of a protected communication. In those circumstances, it may be appropriate for the ICAC to be able to declare that the person's report is to be treated as a protected communication.

From the point in time that the declaration is made and comes to the attention of the relevant person or body, the declared protected communication must be treated as a protected communication. Retaliation against a person for making the communication is then prohibited.

92. Meaning of engage in retaliation

This clause clarifies what conduct is prohibited in relation to a person who has taken protected action. It covers causing harm or threatening to harm a person in retaliation or with the intent to deter a person from taking protected action. Harm is defined broadly to include not only physical and mental harm, but injury loss, damage, intimidation, harassment, and adverse treatment in relation to employment, career, profession, trade or business. This definition is used throughout the whistleblower protection framework, and particularly forms the basis for the offences of retaliation in clauses 97 and 98, the claim for compensation that can be made under clause 99, and for an injunction under clause 100.

93. ICAC to issue directions and guidelines for dealing with voluntary protected communications

The ICAC is required under this clause to issue guidelines to the persons and bodies who receive voluntary protected communications. These may be guidelines that are made separately to or together with the mandatory reporting guidelines issued under clause 20.

94. Nominated recipient

This clause defines who can be nominated by a public body as the recipient of a voluntary protected communication. The person must be a public officer with suitable skills and training for the responsibility of accepting protected communications. This role involves being able to identify whether a communication meets the definition of a protected communication and providing the required information under clause 95. Additional skills and qualifications are not mandatory, but since such a person will be the point of contact for whistleblowers, it is anticipated that nominated recipients would understand the public body's existing mechanisms for reporting and dealing with improper conduct and be able to assist the whistleblower to understand their options and, where appropriate,

to take steps to ensure the public body takes action to deal with the improper conduct or minimise risks of retaliation.

95. Information to be given to protected person

This clause is designed to ensure that clear records are kept of when protected communications are made, and that a protected person and the recipient of the communication have a mutual understanding of the communication that has been made.

96. Protection from liability for taking protected action

This clause enables whistleblowers to report improper conduct and assist the ICAC without fear of breaching a confidentiality requirement or being held civilly or criminally liable for doing so. However, it is only the protected action which is protected. If a person confesses their own improper conduct to the ICAC, this clause does not protect them from the consequences of being held liable for their improper conduct.

97. Offence to engage in retaliation

This clause provides that it is an offence to engage in retaliation (see clause 92 for the definition of retaliation). The clause provides for differing fault elements depending on whether the harm is actual harm or a threat to cause harm, since the ulterior intent in the two situations is different. The crucial element is the offender's state of mind, in that the offender must intend the victim to fear the threat would be carried out or was reckless as to whether the victim actually did fear the threat would be carried out. Whether the victim was actually successfully discouraged by the threat is irrelevant to proving the charge.

If a defendant charged with this offence raises the possibility that their conduct was otherwise legal and was taken for a reason other than the prohibited reason, the prosecution must negative this possibility in order for the defendant to be found guilty. A defendant can also claim that they believed that the 'protected action' was comprised of false or misleading information, although this belief has to have been held on reasonable grounds.

The limitation period for charging this offence is 2 years after the offence is alleged to have been committed.

The penalty for retaliation reflects the existing penalty for the equivalent offence under s 15 of the *Public Interest Disclosure Act*. It carries a maximum penalty of 400 penalty units (\$61,600) or 2 years imprisonment. While 400 penalty units would more often align with a penalty of 4 years imprisonment, the penalty chosen reflects a further consideration. Coercively obtained evidence can be led in criminal proceedings for offences against this Bill, and a policy decision has been made to avoid such evidence being admitted into proceedings for an indictable offence. Additionally, no equivalent offence in the whistleblower schemes of other jurisdictions carries a penalty for more than 2 years.

98. Offence to engage in retaliation in the course of management

This clause provides an additional offence of retaliation which can be charged in the alternative in circumstances where retaliation is by a manager against a person under their management, supervision or control. This offence aims to better assign liability and bring relevant evidence before the court when there is a dispute about whether the 'retaliation' was appropriate management action or retaliation for making a protected communication. Where adverse management action is taken as a reasonable way of carrying out the manager's roles and responsibilities, this is a complete defence to an offence charged under this clause, and there is no need to scrutinise the manager's motives further. However, it is the manager who is required to prove this defence on the balance of probabilities. The limitation period for charging this offence is 12 months after the offence has been committed. The shorter limitation period (compared to clause 97) ensures that a defendant is not left with the onus to prove a defence about a matter too far in the past to be remembered accurately.

As this offence is essentially a variation on the circumstances of the offence at clause 97, and is no more or less seriousness, the same penalty has been applied. The offence carries a maximum penalty of 400 penalty units (\$61,600) or 2 years imprisonment.

99. Compensation for retaliation

This clause enables a person to seek compensation for retaliation. The clause is similar to the existing section 16 of the *Public Interest Disclosure Act*, however also additionally provides that a claim may be brought in the small claims jurisdiction of the Northern Territory Civil and Administrative Tribunal.

Subclause (4) allows the court to consider matters akin to contributory negligence in awarding damages. The purpose of this subclause is both fairness and to provide an incentive to all parties to behave reasonably and take steps to prevent or mitigate potential harm related to retaliation.

100. Injunctive remedies for retaliation

This clause provides that person can also seek an injunction to prevent retaliation or take action to remedy harm suffered as a result of retaliation. An injunction can be sought by a victim or prospective victim of retaliation, or by the ICAC. An interim injunction can also be sought.

101. Facilitating access to justice for victims of retaliation

This clause modifies some default rules that would otherwise apply to court or tribunal proceedings in relation to civil proceedings concerning retaliation. They provide consideration must be given to keeping proceedings confidential, and limit costs being awarded against a victim of retaliation unless a claim was brought vexatiously or the costs relate to the victim being unreasonable. Subclause (4) also clarifies that in proceedings related to retaliation, the court can order an apology be made.

102. Vicarious liability for retaliation

This clause provides that a public body can be held vicariously liable for the actions of its employees. In deciding the damages payable by a public body that is vicariously liable, the court or tribunal may consider the steps taken by the public body to minimise the risk of retaliation, including both steps taken in relation to the specific situation, and general actions such as training and developing policies and procedures to prevent or decrease retaliation. The court or tribunal can also take into account the public body's capacity to implement such steps. Where some action has been taken but the action was insufficient, the court may order that damages be reduced proportionately. This clause varies the general position of the law concerning vicarious liability to provide an incentive to public bodies to take steps to minimise retaliation, and to ensure vicarious liability exists even for gross misconduct when this occurs in the course of employment. It is similar to section 105 of the *Anti-Discrimination Act*.

103. Guidelines to minimise retaliation

This clause directs the ICAC to issue guidelines to public bodies and public officers about how to minimise risks of retaliation. The whistleblower protection principles in clause 88 set out that public bodies have primary responsibility for protecting persons from risks of retaliation, whereas the ICAC's role is to provide guidance and oversight to ensure this is done appropriately. Such guidelines will provide a point of reference for determining whether a public body took appropriate steps to prevent retaliation in a claim for compensation.

104. Direction regarding action to protect persons from retaliation

This clause empowers the ICAC to issue directions to public bodies and public officers for the purpose of protecting whistleblowers and other persons who have assisted the ICAC. Matters about which a direction can be made include, but are not limited to, offering a public officer the opportunity to relocate to another role, and take steps to manage risks of retaliation. The ICAC is obliged to consult with the public body before making such an order, except in certain narrow circumstances where the consultation would be likely to increase the risk of retaliation. Subclauses (5) and (6) limit the circumstances where such an order can be made to a body or officer that is not controlled by the Territory and does not represent the Territory. The intention of these subclauses is to limit the extent to which the ICAC can make such directions to contract service providers.

105. Supreme Court may vary or revoke direction

This clause applies when a public body or public officer wishes not to comply with a direction made by the ICAC under clause 104. The public body or public officer may apply to the Supreme Court to vary or revoke the direction. The public body or public officer must satisfy the Supreme Court that there is either an urgent need for non-compliance to protect substantial harm to a person or to essential public interest, or alternatively a case that non-compliance is reasonable to perform essential functions, and appropriate steps have been taken to minimise risks of retaliation that may be caused by non-compliance.

106. Parties and procedure

This clause specifies certain procedural matters concerning an application made under clause 105. It provides that whistleblowers, persons at risk of retaliation, the ICAC, and the Commissioner for Public Employment, may all be parties to such a proceeding. Similarly to clause 101, consideration must be given to keeping proceedings confidential and information may even be restricted from a party if necessary to protect the identity of a protected person, protect a person from retaliation, or to protect the ICAC's investigations. Given the significance of restricting evidence from a party, the Supreme Court:

- has a discretion whether this occurs and only allows it when the Court is satisfied that it is necessary for certain limited purposes; and
- may call upon the Inspector in an *amicus curiae* role, to question witnesses and make submissions that would assist the court to test the appropriateness and validity of the proposed direction in the absence of an affected party.

It should be noted that the party restricted from viewing evidence will in most cases be a public body, or a public officer performing government functions, and so this process is unlikely to infringe on the personal liberty of individuals. Even though the Inspector performs a neutral role and does not represent the missing party, it should be noted that a public body or public officer would be under an obligation to act as the model litigant, and the body or officer's interests are to act in the public interest, which is the interest the Inspector would also be aiming to uphold.

107. Audits and reviews

This clause clarifies that the ICAC's general power to conduct an audit or review extends to audits and reviews for the purpose determining whether a public body is complying with directions and

guidelines relating to whistleblower protection. Similarly to clause 21, the ICAC cannot audit or review a court or judicial officer in relation to the performance of judicial functions.

108. Recommendations

This clause empowers the ICAC to make recommendations to a public body to improve compliance with directions or adherence to the guidelines, or to generally better manage the risks of retaliation. Failure to follow these recommendations can result in reports being made under clauses 54 and 55.

109. ICAC may arrange protection and require police assistance

The ICAC is empowered by this clause to arrange physical protection for a person at risk of intimidation, harassment, or harm. The definition of harm in this clause is narrower than harm for the purposes of defining retaliation. For example, it does not encompass mere adverse action in relation to employment. It is anticipated to only very rarely be needed, and for that reason it is unlikely the ICAC would itself maintain staff who could serve this function. Subclause (2) therefore allows the ICAC to provide the protection by either directing the Commissioner of Police to take action to provide protection to a person, or to engage another person or body to provide the protection. While providing physical protection has significant resourcing implications, it is anticipated that the circumstances where such physical protections are warranted would not arise frequently.

Part 7 – Staffing, Accountability, and Offences

110. Appointment of ICAC

This clause provides for the appointment of the ICAC by the Administrator. A person is appointed as ICAC following a recommendation of the Legislative Assembly. 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. The Martin Report recommended that the ICAC be appointed by a panel such as the Judicial Appointments Panel making recommendations to a bipartisan Standing Committee of the Assembly. Whether such a Committee is created is a matter for the Assembly, but this clause means that the Legislative Assembly must at least consider and vote for any proposed appointee. The appointee cannot simply be chosen by Cabinet without the assent of the Assembly.

111. Eligibility for appointment

This clause sets out the criteria for eligibility to be the ICAC. The qualifications recommended by the Martin Report have been adopted. In addition, the clause makes ineligible persons who have a 'recent political affiliation'. The meaning of recent political affiliation is designed to exclude persons who are likely to have ongoing political involvement that might compromise their ability to be and be seen to be impartial, but not to unduly narrow the field to exclude persons who have merely exercised their democratic rights to participate in discussions of matters of politics and policy. If the ICAC is a public officer prior to appointment, the ICAC must resign their role as a public officer prior to being able to exercise any of the powers or functions of the ICAC.

112. Term of appointment

This clause provides that the ICAC can be appointed for a fixed term of 5 years, and optionally for a further fixed term of 5 years.

113. Conditions of appointment

This clause provides that the conditions of the ICAC's appointment are to be determined at the commencement of the appointment and then not varied during the appointment. The ICAC cannot, for obvious reasons, be given 'performance pay'. However, it would be permissible to provide that the ICAC's salary automatically increases annually independent of performance (for example, in line with indexation). The purpose of subclause (2) is to safeguard the ICAC's independence.

114. Leave of absence

In the event that the ICAC requires a leave of absence, for example due to unforeseen personal matters, such leave can be granted by the ICAC Minister.

115. Vacancy in office

This clause provides the circumstances in which the office of the ICAC becomes vacant. This occurs if there is a resignation as set out in clause 116 or if there is an involuntary termination. The ICAC's appointment automatically terminates upon conviction of certain offences, the imposition of a term of imprisonment, or bankruptcy. The appointment also terminates if the ICAC stands for election as a political representative, or if the ICAC ceases to satisfy the eligibility criteria (for example, if the ICAC makes a declarable political donation). Subclause (2) protects the validity of decisions made by the ICAC even if the ICAC was ineligible for appointment at the time—this is essential to preserve the integrity of investigations which would otherwise be valid.

116. Resignation

This clause provides the mechanism by which the ICAC can resign, namely by providing written notice to the Administrator.

117. Suspension and termination of appointment

In addition to the matters which automatically deprive an ICAC of their appointed status set out by clause 115, clause 117 provides that the ICAC may be suspended from duty by the Administrator in certain circumstances. These include physical or mental incapacity, engaging in corruption, engaging in outside employment without approval, or ongoing absence from duty. Suspending the ICAC is a temporary measure. In order to terminate the ICAC, a two-thirds majority of the Legislative Assembly must agree to the termination. This procedure is consistent with the procedure for removing the Ombudsman in section 141 of the *Ombudsman Act*.

118. Acting ICAC

This clause enables the appointment of one or more Acting ICACs. An Acting ICAC may be appointed in relation to a particular, specified matter, which is a provision likely to be utilised when the ICAC has a conflict of interest. Alternatively, if the ICAC is unavailable, or no one holds the role of the ICAC, an Acting ICAC can be appointed as an interim measure to generally act as the ICAC so that the functions of the ICAC under this Bill can continue to be carried out.

An ICAC appointed under subclause (2) is a special appointment for an occasion where there is a need to investigate the ICAC or a member of the ICAC's staff for improper conduct. While most complaints concerning the ICAC will be dealt with by the Inspector appointed under clause 131, the Inspector's powers to investigate are not as extensive as those of the ICAC. A person is only eligible to be appointed as an Acting ICAC under subclause (2) if they are not and have never been a public officer, meaning they themselves are a person who cannot be investigated by the ICAC, avoiding the possibility of the two persons investigating each other. Further, clause 111(1) (d) provides that such an appointee cannot subsequently be appointed as the ICAC for 2 years after the conclusion of their appointment as Acting ICAC. This is to ensure that such an Acting ICAC's views are not coloured or perceived to be coloured by a desire to discredit the ICAC in order to be appointed as the ICAC. It preserves such a person's independence.

To ensure that a government is not tempted to continue to appoint a series of Acting ICACs rather than the standing ICAC role, subsection (4) provides that no further appointments of Acting ICACs can be made after the office of ICAC has been vacant for a period of 18 months. There may be

occasions where a person who holds another role as a public officer may be an appropriate person to be an Acting ICAC to carry out a particular investigation – for example, the appropriate person may also hold a role as an Acting Judge, or be a director of a board that is funded by government grants. There is no reason why such a person should be excluded from being appointed as an Acting ICAC to investigate a matter unrelated to the sense in which they are a public officer. However, it would be inappropriate for an Acting ICAC employed by a particular Agency to be investigating that Agency. Subsection (6) is designed to exclude inappropriate appointments of public officers to the role of Acting ICAC without excluding situations where the appointee is a public officer in another, unrelated capacity.

There may be issues to be further addressed as to whether an Acting ICAC should have the power to deal with judicial officers.

119. Oath before taking office

This clause provides that the ICAC or Acting ICAC must take an oath to perform their role faithfully, impartially, truly, and in accordance with law. It is common for independent statutory officers to take an oath of this nature.

120. ICAC staff

This clause provides a definition of the term 'ICAC staff', and clarifies that it extends beyond persons who are employees of the ICAC's Office as an Agency. It covers seconded staff, consultants, and police officers who are made available by an arrangement with the Commissioner of Police.

Subclause (2) allows a police officer to retain the duties and powers of a police officer while assisting the ICAC, similarly to the equivalent South Australian legislation. Should an ICAC investigation require forced entry onto private premises, or to arrest persons, the ICAC's staff would not necessarily have the specialist training and equipment needed for these kinds of actions, and the ICAC itself does not have a specific power to arrest persons. Such situations can be dealt with by means of making arrangements with the Commissioner of Police to use police officers with suitable training and equipment. It is also contemplated that subclause (2) will allow for a range of appropriate approaches to be considered with respect to defining the chain of command in a joint ICAC / Police investigation of an offence. Subclause (2) may also assist the ICAC in procuring staff with police experience, since a wider range of police officers may be interested in working for the ICAC if this does not require them to give up their status as a serving police member.

121. Staff not subject to external direction

Persons who are defined as ICAC staff in accordance with clause 120 are subject only to the direction of the ICAC by virtue of clause 121 when performing functions under the ICAC Act. This means that when staff are seconded or otherwise made available by arrangement, any conflict of duties is to be resolved in favour of the ICAC. This preserves the independence and integrity of the ICAC's investigations.

122. Delegation

This is a standard clause that allows the ICAC to delegate powers to staff. It does not include the power to delegate the power to delegate, which is also standard.

123. Suitability checks

This clause ensures the ICAC has the authority to carry out background checks on staff and potential staff. Given the sensitivity of the information that staff have access to and the functions they will perform, Checks may extend beyond mere criminal history checks. The concept of a ‘police intelligence or integrity check’ contemplates that the ICAC may have reference to police intelligence concerning a person, including matters that have not resulted in a charge or conviction, and to information that reflects generally a person’s integrity including their associations. Clause 123 contemplates that suitability checks may be carried out on any staff member, although given the intrusive nature of some of these checks they are framed as ‘requests’ rather than ‘requirements’. What checks can be insisted upon for a particular staff member or position will therefore depend on what is necessary for to ascertain for the ICAC to perform its role and functions. When a person is to be designated an ‘authorised officer’, allowing them to exercise the ICAC’s coercive powers, the ICAC is required under clause 128 to satisfy themselves of the person’s suitability.

Subclause (3) clarifies that the ICAC is able to take into account a person’s irrelevant criminal record, and the person’s political opinion, affiliation or activity, even if this would otherwise be prohibited under the *Anti-Discrimination Act*. While the *Anti-Discrimination Act* does allow discrimination where this relates to performing an inherent requirement of the job, the purpose of subclause (3) is to clarify that it is legitimate for the ICAC to consider that political neutrality and a strong commitment to adhering to the law are inherent requirements of working for the ICAC.

124. Handling information regarding suitability

This clause protects the integrity of the process concerning a determination of suitability, and encourages honest and frank consideration of the issues, by requiring strict confidentiality concerning material obtained under clause 123. It should be noted that a consequential amendment to the *Information Act* will also provide an exemption from disclosure under the freedom of information scheme that applies to ICAC information generally.

125. Annual report

This is a standard provision that requires the ICAC to produce an annual report. The clause also specifies that the report must include some required quantitative and qualitative information with respect to the ICAC’s activities. It is anticipated that the ICAC will include as much information as appropriate to explain the meaning of the quantitative data, without revealing confidential information about investigations.

126. Guidelines and practice directions for ICAC staff

This clause requires the ICAC to issue guidelines to ICAC staff and to keep these guidelines up to date. Guidelines must be issued within 2 months.

127. Website

This clause requires the ICAC to maintain a repository of information about its activities and functions that is easily accessible to the public via a website. Such clauses are standard for statutory bodies in contemporary legislation.

128. Appointment of authorised officers

This clause specifies who may be an authorised officer, which is a person appointed by the ICAC to exercise the ICAC's coercive functions. Typically, a person employed or engaged by the ICAC as an investigator would need to be designated as an 'authorised officer' in order to be able to carry out their role. Given the seriousness of the powers exercised by authorised officers, there is a requirement placed on the ICAC to ensure that a person appointed as an authorised officer is suitable for the role.

129. Identity card

This is a standard clause for persons who represent and exercise coercive functions on behalf of a statutory body. It provides that an authorised officer be issued an 'identity card' which persons can view in order to satisfy themselves that a person claiming to be an authorised officer is in fact an authorised officer.

130. Return of identity card

This clause requires a person to return an identity card if they are no longer an authorised officer and makes it an offence not to do so. To provide an incentive to ensure this obligation is taken seriously, a small but significant maximum penalty of 20 penalty units (\$3080) applies to a failure to return the card without reasonable excuse.

131. Appointment of Inspector

This clause creates a statutory role whose function is to oversight the ICAC. The intention is not to create a further ICAC to monitor the ICAC, but to provide that there is an experienced person who can access the ICAC's records to ensure the ICAC is acting within power. This role will also provide crucial oversight to ensure very intrusive powers such as telecommunications intercept activities are not being abused. The Inspector is appointed for a period of up to 5 years and must themselves be someone who would be qualified to be appointed as the ICAC.

132. Functions of Inspector

The Inspector's key functions are to:

- provide the Legislative Assembly with an annual evaluation of the ICAC in accordance with clause 133;
- handle complaints about the ICAC; and
- make recommendations to the ICAC and other public bodies with respect to performing functions under this Bill.

The function of making recommendations offers a valuable opportunity for the ICAC to receive independent suggestions for improvement.

133. Evaluation of ICAC

This clause provides that the Inspector is to conduct an annual evaluation of the ICAC, and that this evaluation is to focus on whether the ICAC has acted within power and in compliance with legislation.

While it is possible for the Inspector to consider the ICAC's conduct more generally, it is anticipated that the Inspector would not engage in a subjective and more broad-reaching assessment of whether the ICAC's approach to matters is preferable. However, the Inspector may wish to deal with issues of particular concern, and follow up on whether recommendations made to the ICAC have been implemented.

134. Report on evaluation

This clause provides that a report on the evaluation must be provided to the ICAC to comment, and then to the ICAC Minister for tabling in the Legislative Assembly.

135. Complaints about ICAC

This clause provides that the Inspector is designated with the function of receiving complaints about the ICAC. In addition, it requires the ICAC to pass any complaints about it to the Inspector within 14 days of receipt. The Inspector has a broad discretion as to how it deals with complaints.

136. Access to ICAC premises and information

This clause empowers the Inspector to access the ICAC's premises and information. It also requires the ICAC and members of ICAC staff to provide reasonable assistance where required.

137. Further powers of Inspector

As a result of an evaluation or complaint concerning the ICAC, the Inspector has several powers. The Inspector may make recommendations to improve processes and procedures, may refer disciplinary matters to the ICAC or another public body, or refer a matter to a law enforcement agency for further investigation. In the event that the Inspector is of the view that an allegation requires further investigation than the Inspector is able to achieve, the ICAC can recommend that the ICAC Minister appoint an Acting ICAC to investigate the ICAC or a member of ICAC staff under clause 116(2). This would by its nature presumably be a serious and complex allegation.

138. Confidentiality of information

This clause requires the Inspector to omit information from a report that is unnecessary for the effective performance of the inspector's functions, particularly if the disclosure could compromise:

- preliminary inquiries, investigations, or referrals
- potential criminal proceedings; or
- the safety and wellbeing of any individual, or cause reputational damage.

139. Inspector's staff

This clause clarifies that the Inspector may have staff consisting of persons who are employed by an Agency but made available under an agreement, and persons engaged as consultants. By the definition of a 'public officer' in clause 14, a member of the Inspector's staff is not a public officer in relation to performing functions for the Inspector, and hence cannot be investigated by the ICAC.

140. Unauthorised disclosure of information obtained in the course of performing official functions

This clause makes it an offence for a person involved in performing functions under this Act to disclose confidential information. As such, this offence could be committed by ICAC staff, but also by persons performing other roles such as officers dealing with referrals, persons who receive whistleblower allegations, and the Inspector.

It is not an offence to disclose confidential information in the course of performing functions under this Act, and in other situations such as staff seeking legal advice or assistance from a health practitioner. It should be noted that the ICAC has the power under clause 142 to even further restrict disclosure of information so that disclosures that are permissible by default under clauses 140 or 141 are not allowed. The intention of the list of permissible disclosures is to ensure the ICAC does not spend undue resources oversighting and approving reasonable requests to disclose information. Nevertheless, the ICAC also has the capacity under subclause (3)(d) to approve a disclosure of information that would otherwise be prohibited under this list.

Where independent entities are conducting their own functions (for example, investigating a matter that has been referred or reported to them under this Bill), they are under an obligation to carefully consider whether disclosure of identifying information (revealing the identity of a protected person) is reasonably necessary to carry out their functions. It should be noted that most independent entities have their own confidentiality provisions, but also good faith provisions to ensure that honest errors of judgement when carrying out their functions does not place them at risk of prosecution.

The penalty for disclosure of confidential information reflects the existing penalty for the equivalent offence under section 53 of the *Public Interest Disclosure Act*. It carries a maximum penalty of 400 penalty units (\$61,600) or 2 years imprisonment. While 400 penalty units would more often align with a penalty of 4 years imprisonment, the penalty chosen reflects a further consideration. Coercively obtained evidence can be led in criminal proceedings for offences against this Bill, and a policy decision has been made to avoid such evidence being admitted into proceedings for an indictable offence. The information being handled under the Bill will include information of extreme sensitivity, including information that may put a whistleblower at risk of retaliation, and it is appropriate that a significant penalty is applicable and aligned with the penalty for the offence of retaliation.

141. Unauthorised disclosure of information in other circumstances

This offence is similar to the offence in clause 140, but it applies to persons who are not performing functions under the ICAC Act. For example, witnesses who provide information may learn confidential information about an ICAC investigation during the course of questioning. This provision makes it an offence to discuss this confidential information other than with a limited list of persons. Similarly to an equivalent South Australian provision, disclosure is permitted not only to the kind of persons listed under clause 140, but also to close family members. If the ICAC deems this would be inappropriate in a given situation, it can issue a direction under clause 142 to prohibit disclosure even to close family members.

The offence carries a maximum penalty of 400 penalty units (\$61,600) or 2 years imprisonment. The penalty for this offence is consistent with the penalty imposed for the similar offences at clauses 140 and 142 of the Bill.

142. Direction not to disclose certain information

This clause empowers the ICAC to direct a person not to disclose information by means of a ‘non-disclosure notice’. It is similar to the power currently provided by section 53B of the *Public Interest Disclosure Act*. It does not prevent a person providing information to a lawyer, doctor, or psychologist for the purpose of seeking legal or medical assistance.

The penalty aligns with similar offences at clauses 140 and 141 of the Bill, and with section 53B of the *Public Interest Disclosure Act*. This is particularly appropriate because the transitional provision at clause 160 provides that s 53B notices issued under the *Public Interest Disclosure Act* essentially ‘become’ notices issued under clause 142 of the Bill at the time the Bill commences as an Act.

143. Failing to comply with requirement for information or documents during investigation

This clause makes it an offence to fail to comply with a direction of the ICAC. As with a number of similar offences in the Bill, this is a strict liability offence that carries a maximum penalty of 100 penalty units. The maximum penalty is 100 penalty units (\$15,400). This penalty is similar to the equivalent offence under section 26 of the *Public Interest Disclosure Act*, which has been sufficient to ensure compliance during the 7 or so years of that Act’s operation. Note that clause 148 is potentially also applicable if the failure amounts to intentional obstruction of an authorised officer.

144. Failing to comply with notice to attend or answer questions or produce things at examination or public inquiry

This clause makes it an offence to fail to attend an examination, answer questions, or give evidence as required by the ICAC. As with a number of similar offences in the Bill, this is a strict liability offence that carries a maximum penalty of 100 penalty units (\$15,400). Note that clause 148 is potentially also applicable if the failure amounts to intentional obstruction of an authorised officer.

145. Failing to comply with direction of ICAC at public inquiry

This clause makes it an offence to fail to comply with a direction of the ICAC at a public inquiry—for example, failing to leave a public inquiry if directed to do so. Consistent with other similar offences in the Bill, it is a strict liability offence punishable by a maximum fine of 100 penalty units (\$15,400).

146. Contravening direction regarding whistleblowers

This clause makes it an offence to intentionally disregard a direction issued by the ICAC under clause 104, being a direction aimed at protecting a person from retaliation. Consistent with other similar offences in the Bill, it is a strict liability offence punishable by a maximum fine of 100 penalty units (\$15,400). In the event that contravention of a direction results in retaliation, the offence of retaliation at clause 97 could be charged, which has a higher maximum penalty. Similarly, if the action obstructed an authorised officer in the performance of functions under this Bill, the offence of obstruction in clause 148 could be charged, which also has a higher penalty.

147. Falsely representing to be authorised officer

This clause makes it an offence to pretend to be an authorised officer of the ICAC if a person is not an authorised officer. It is intended to deter persons from pretending to be an authorised officer in order to misuse their presumed authority. The offence carries a maximum penalty of 200 penalty units (\$30,800) or 2 years imprisonment. For the reasons articulated in these explanatory notes in relation to clause 97, no offence under this Bill carries an imprisonment penalty of more than 2 years imprisonment. The usual practice is that an offence with 2 years imprisonment warrants an equivalent monetary penalty of 200 penalty units, and there seems to be no reason to vary that practice in relation to this offence, as there is no reason to believe this is behaviour which is likely to occur without additional deterrence. A penalty of 2 years imprisonment is a little higher than the equivalent offences in the *Independent Commissioner Against Corruption Act* (SA) at section 53, or the *Independent Commissioner Against Corruption Act 1988* (NSW) at section 95, both of which impose a maximum penalty of 1 year imprisonment. However, it is appropriate in view of the offence of impersonating a public officer at s 86 of the *Criminal Code* (NT), which carries a penalty of 3 years. Section 86 does not already adequately provide an offence for impersonating an authorised officer, since an authorised officer of the ICAC is not necessarily 'employed in the public service' within the meaning of section 86.

148. Obstruction of authorised officer

This clause makes it an offence to obstruct an authorised officer in carrying out their duties under the Act. The conduct prohibited here is broader than contravening a direction under clauses 143-145, although clause 148 is not a strict liability offence, so an intention to obstruct must be proven. Consistently with the equivalent provision in section 52 of the *Public Interest Disclosure Act*, and commensurate with the gravity of the ICAC's functions, the offence carries a maximum penalty of 400 penalty units (\$61,600) or 2 years imprisonment.

149. Misleading information

This clause makes it an offence to provide the ICAC with false or misleading information. The offence is standard in legislation of this nature. The maximum penalty for providing false and misleading information, including false and misleading information in a document is 400 penalty units (\$61,600) or imprisonment for 2 years. This is consistent with the equivalent provision in section 51 of the *Public Interest Disclosure Act*, and is intended as a strong incentive to require informants, witnesses, and the subjects of allegations to take their obligation to be honest and forthcoming seriously.

Part 8 – Miscellaneous matters

150. Protection from liability for acting in an official capacity

This is a standard clause that provides protection from personal liability for person carrying out official functions under this Act in good faith. Civil claims for compensation for injuries suffered can still be brought against the Territory. Subclause (3) clarifies that this clause should not be interpreted to affect Part VIIA of the *Police Administration Act* where this is applicable, being the Part of that Act which provides framework for making civil claims against police members.

151. Evidence in criminal proceedings

This clause gives the court the discretion to require the ICAC to produce its confidential records for a criminal proceeding, where the court is satisfied that this is required in the interests of justice. Before making an order to this effect, the court must give the ICAC a reasonable opportunity to appear and make submissions. The court must further examine the evidence prior to determining whether it makes the evidence available to the parties. This is designed to ensure confidentiality around the ICAC's functions is preserved, but not to the point it would unduly interfere with the administration of criminal justice.

152. Service

This clause provides a range of contemporary methods of electronic service of formal notices, directions, or requests may be used by the ICAC. In addition to the methods provided by the *Interpretation Act*, service by email is provided for (similarly to the current regime in the *Public Interest Disclosure Act*). In addition, if those methods of service fail or are otherwise impracticable, the ICAC has the discretion to authorise service using other methods (eg. via a social media account other electronic process). The Inspector and other persons performing functions under the Act, such as nominated recipients, may also use the methods in subclause (1), but only the ICAC has been given the discretion to permit the methods in subclause (2). It is anticipated that these will not be required by the Inspector, and the discretion to allow service by these methods is best otherwise restricted to when they are authorised by the ICAC, to ensure adequate consideration of their reliability in a given instance.

153. Dealing with unclaimed property

This clause provides for a process for dealing with property that is in the ICAC's possession, is no longer required, and has no apparent lawful owner. For such matters ICAC can seek an appropriate order from a court of competent jurisdiction.

154. Regulations

This clause is a standard clause that provides for regulations to be made. These regulations may include, but are not necessarily limited to, provision for certain registers to be kept by the ICAC, and allowances to be paid to witnesses. This clause should be read with the *Interpretation Act* which contains provisions that sets out the kinds of matters that can be dealt with by way of regulation.

Part 9 – Repeal and Transitional Matters for Independent Commissioner Against Corruption Act 2017

155. Act repealed

This clause repeals the *Public Interest Disclosure Act*. That Act established the Commissioner for Public Interest Disclosures, which investigated corruption in the Territory, but with more limited powers and jurisdiction than the ICAC. The Commissioner for Public Interest Disclosures also administered the whistleblower scheme. A new whistleblower protection scheme is provided by Part 6 of the Bill, so the functions that were fulfilled by the Commissioner for Public Interest Disclosures will be fulfilled by the ICAC when the ICAC legislation commences operation.

It is anticipated that this Division will be timed to commence when the major provisions of the Bill (Parts 1 to 8) become operational.

156. Definitions

This clause defines key terms for the transitional provisions. They are self-explanatory or refer to provisions of the *Public Interest Disclosure Act*, which is being repealed.

157. Protection continues for previous disclosures

This clause provides that whistleblowers under the *Public Interest Disclosure Act* are to be treated as having made a protected communication under the Bill.

158. Current investigations

This clause provides that responsibility for ongoing investigations of public interest disclosures become the responsibility of the ICAC, and that disclosers are to be contacted and notified that the ICAC is now handling their matter.

159. Relocation of public officers

This clause clarifies that if an application for relocation is made before the date that cl 153 commences, the application will be processed, with the ICAC performing the role of the Public Interest Disclosure Commissioner. The ICAC's power to direct public bodies and public officers in order to protect whistleblowers mean that the ICAC also has its own power to assist a whistleblower with relocation if this is needed.

160. Non-disclosure directions

This clause provides a transitional process for non-disclosure directions made under the *Public Interest Disclosure Act*. The ICAC has 6 months to review these directions before they automatically expire. The ICAC has the capacity to issue further directions which 'renew' PID non-disclosure directions as ICAC non-disclosure directions under cl 142.

161. Report about implementing recommendations

This clause enables the ICAC to follow-up on whether outstanding recommendations made by the Public Interest Disclosure Commissioner are followed.

162. Provisions if Act does not commence at start of financial year

This clause provides that if the ICAC Act commences on a date where its first financial year is not 12 months, it issues its first annual report in the following year and covers the period since commencement. This gives the ICAC a reasonable opportunity to set up processes and procedures for gathering the data needed to provide the annual report, and ensures that the report contains at a minimum a full year of data.

Schedule 1

This schedule provides a framework of considerations to guide the ICAC in carrying out functions under the Bill, particularly where those functions involve exercising a discretion.

Schedule 2

This schedule sets out the required information to be provided to a person who makes a protected communication in accordance with clause 95(3), in addition to the matters listed at clause 95(1). This information provides a protected person with basic information about their role and responsibilities, as well as the services and protections available to assist them.