

Independent Commissioner Against Corruption

*Independent Commissioner Against Corruption Act 2017
Independent Commissioner Against Corruption
(Consequential and Related Amendments) Act 2018*

The following is intended to provide general information and raise awareness. It is not legal advice. While every effort is made to ensure the information is accurate, no representation is made about the accuracy or currency of the content.

In 2018, the Territory will have its first office and staff of the *Independent Commissioner Against Corruption* (ICAC). The law establishing the ICAC, the *Independent Commissioner Against Corruption Act 2017* (ICAC Act), passed Parliament in November 2017. In February 2018, Parliament enacted the *Independent Commissioner Against Corruption (Consequential and Related Amendments) Act 2018* (ICAC Consequential). The ICAC Act repeals the *Public Interest Disclosure Act* and the ICAC Consequential will make the necessary changes to other NT legislation, including the *Criminal Code Act*, the *Surveillance Devices Act* and the *Telecommunications (Interception) Northern Territory Act*.

The ICAC will be very powerful, with extensive and broad powers. The ICAC Act revolves around reporting to the ICAC and identifying and investigating improper conduct of a public officer or a public body that is connected to public affairs. These terms have very wide definitions and combined, cover a wide range of conduct, people and bodies.

The following sets out a high-level appraisal of how this works.

What is it about?

The ICAC is required to investigate and bring light to any corruption in the NT.

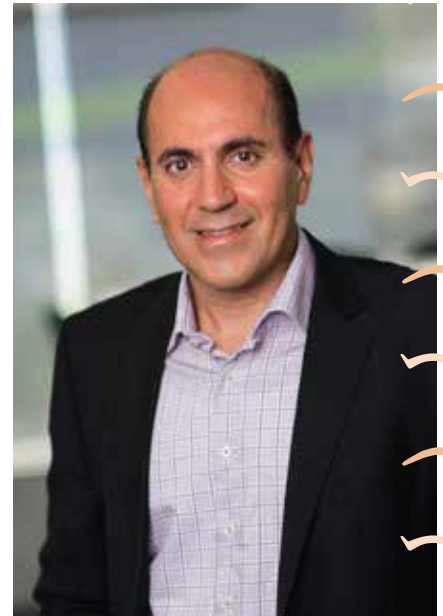
Regardless of other laws in the NT that finalise a matter, or something is investigated elsewhere, the Commissioner can still investigate if he or she has information that tends to show, if true, improper conduct (or matters directly or indirectly connected with improper conduct) has occurred or is at risk of occurring. The Commissioner may collect or receive information from any source.

By way of the ICAC Act, combined with the changes brought about by the ICAC Consequential, the Commissioner:

- Can investigate any public officer, including Members of the Legislative Assembly and can do so of his or her own motion. Investigations can be conducted covertly.
- Is not limited to investigate only conduct that could amount to criminal behaviour. The Commissioner is also required to look into conduct that may warrant termination of employment or disciplinary action.
- Has coercive powers, including searching government agencies without a warrant and can apply for warrants to search private premises.

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- Can use and install surveillance devices and intercept telecommunications.
- Has access to correctional premises and to prisoners as required.
- His or her officers can acquire and use assumed identities in investigations.
- Can arrange for witnesses to be considered for the Territory Witness Protection Program.

In relation to investigations, examinations and inquiries, the ICAC is not bound by the rules of evidence. Once the ICAC has an evidentiary basis to commence an investigation, the ICAC has a wide range of coercive powers. The legislation provides for a raft of comprehensive tools to allow the ICAC to go about his or her job.

Although the Commissioner is subject to judicial review, he or she cannot be restrained from commencing, or continuing to conduct, or to compel the ICAC to commence, or continue to conduct, an investigation or public inquiry.

The ICAC's jurisdiction is fully retrospective and not limited to conduct in the Territory. The Commissioner can investigate any conduct within its remit, including past conduct and historical matters and whether or not a person has ceased employment with the government. There is no time limit as to how far back the ICAC can go.

What do you need to know?

The ICAC is an individual rather than an organisation. The Commissioner will have staff and the legislation provides

for some detailed vetting of individuals, including checking on spent convictions.

The Commissioner is given power to investigate a wide range of improper conduct in the broader public sector and connected to public affairs. The ICAC can conduct random audits of compliance or review the practices, policies or procedures of a public body or public officer to identify whether improper conduct has occurred, is occurring or is at risk of occurring.

The definition of public officer is very broad. The legislation applies to including:

- government owned corporations
- ministers, MLA's, electorate staff and ministerial advisers
- judges, courts hospitals and universities
- government contractors and NGO's in receipt of public funds.

What is improper conduct?

Improper conduct includes:

Corrupt conduct

- Any potential offence for which the penalty is at least two years imprisonment.
- Includes conduct that constitutes reasonable grounds for dismissing or terminating the services of the public officer (e.g. dishonesty, failure to manage conflict of interest, or misusing public resources).

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Misconduct

- Wrongful conduct by an individual that is less serious than corrupt conduct or any potential offence that attracts a fine or imprisonment for less than two years.
- Includes conduct constituting reasonable grounds for taking disciplinary action against the officer (short of dismissal or termination of appointment).

Unsatisfactory conduct

- This relates to illegality, impropriety, negligence or incompetence that results in substantial mismanagement of public resources; the inappropriate or significantly inefficient use of public resources; or substantial mismanagement in relation to the performance of official functions.
- Judicial officers are excluded but only in relation to performing judicial functions.

The ICAC can also investigate anti-democratic conduct, certain offences in relation to elections and the electoral process under the *Electoral Act* and electoral provisions in the *Local Government Act* e.g. offences relating to improper handling of political donations or attempting to more broadly influence the outcome of an election.

The Commissioner is required to give priority to matters involving corrupt conduct or serious anti-democratic conduct. It is intended the ICAC focus on serious corruption. In relation to misconduct and unsatisfactory conduct—unless there is good reason for the ICAC to deal with the matter, the ICAC is to look at transferring those to someone else, e.g. the Ombudsman, police or specialist bodies, such as the Children's Commissioner or Anti-Discrimination Commissioner.

Investigations

The Commissioner has powers to enter public sector premises without a warrant, private premises with a warrant and to compel witnesses to attend and give evidence on oath.

Subject to suspecting on reasonable grounds there is evidence of improper conduct, ICAC and staff can search premises (including by force), take photographs, make films, audio, video or other recordings, of anything on the premises or found on a person and seize anything found on the premises, or on a person.

Offences

The ICAC Consequential makes important changes to the *Criminal Code* and associated penalties. These changes include:

Definition of 'gain' and 'benefit'

These terms are broadly defined. To gain includes temporary gain and gain by keeping what one has.

A benefit includes a benefit of any kind or a promise of a future benefit. By way of example, this definition could include inappropriate relationships, sexual relationships or being given priority in a selection process. It includes a benefit obtained for another person (e.g. spouse, friend).

Giving or receiving benefits

A public officer commits an offence if the officer intentionally requests or knowingly obtains a benefit and the officer knows the benefit is an inducement to influence the officer's performance of the officer's powers or functions or a reward for the officer having performed the officer's powers or functions in a particular way or for a particular result and the conduct is improper.

Other corrupting benefits, such as accepting gifts

This new provision makes it an offence to intentionally request, or knowingly obtain, a benefit which the public officer knows would be an inducement to influence the officer's performance of the officer's powers or functions.

Advancing secret personal interests

It is an offence for a public officer to fail to disclose a private interest where, by virtue of their function or duties, they could influence that private interest. A private interest is defined to mean a legal or financial interest that

is held directly or indirectly. It is also a more serious offence for a person who both keeps their private interest secret and then uses their position as a public officer to advance that private interest to obtain a benefit.

Abuse of office – dishonesty

A public officer commits an offence if the officer intentionally provides, certifies or approves a document that is false in a material particular; or intentionally modifies a document so that it is false in a material particular in relation to someone's rights; or in relation to the spending government money.

Abuse of office – arbitrary and prejudicial conduct

It is an offence for a public officer to intentionally engage in conduct that is arbitrary or an abuse of process.

Confidentiality

The person must not disclose information that the person gained access to as a public officer and this obligation continues after a public officer leaves their employment.

Reports, audits and other matters

The Commissioner can:

- Create a mandatory reporting scheme, including directions and guidelines.
- Undertake audits, investigations, joint investigations and use the information to commence or progress an investigation.
- Give protection to whistle blowers and determine protected persons and protect them from retaliation.
- Require people to attend ICAC for compulsory examinations and require a person to answer questions and provide information, produce documents and verify the information on oath.

- Inspect financial records of deposit holders.
- Prevent improper conduct through education, advice and reports.

Mostly, investigations will be carried out in private. However, there is provision for public inquiry. The Schedule to the legislation sets out matters the ICAC is to consider in determining whether to hold a public inquiry.

Following investigation, ICAC can prepare a number of reports, including:

- **Brief of evidence:** To pass on evidence for the purposes of investigation of an offence, prosecution of an offence or disciplinary action against a public officer.
- **Investigation report:** To make findings and reach conclusions in relation to whether improper conduct occurred.
- **Recommendations:** To require steps to be taken to address or prevent improper conduct.
- **General report:** To make public matters of general concern in relation to systemic issues or operational issues of public interest.

Legal privilege and legal representation

There are provisions dealing client privilege, legal representation, confidentiality, use of statements and admissible material. Generally speaking, client legal privilege (legal professional privilege) can be claimed by individuals but not by public bodies. The Territory's legal advice must be disclosed to the ICAC but legal advice of individuals and private entities remains protected. Unless currently charged with, or facing criminal proceedings for an offence, or subject to another exception relating to an open session; a witness is not entitled to refuse or fail to give evidence on the ground that the evidence might tend

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to incriminate the witness or make the witness liable to a penalty. As the application of these provisions can be quite technical, people giving evidence to the ICAC should seek legal advice on these issues.

Safeguards

To ensure oversight of the ICAC's broad and coercive powers, the ICAC will be overseen by an Inspector to ensure the Commissioner acts within powers. The Inspector has been given a number of powers to check on the ICAC. This includes the power of regular inspection of the ICAC's records to decide the extent of compliance with the ICAC Act.

Another safeguard is that at a court hearing, the finder of fact (e.g. a judge) can find the conduct was not improper

if satisfied the conduct is trivial or the conduct has caused only minimal damage to the public interest; and the judge is satisfied the conduct, in the circumstances, does not warrant criminal sanction. In deciding this, the judge has regard to a number of things, including whether the public officer behaved reasonably, whether the person acted in an honest and reasonable belief, the seriousness of the conduct and whether the conduct was an isolated incident. The policy behind this recognises that from time-to-time cases will arise which involve low-level conduct which technically meets the offence definition but would be more appropriately dealt with through disciplinary and other measures rather than criminal sanctions. The court can also in its discretion dismiss the case if the court considers the offence is of a trivial or merely technical nature.

6 March 2018 Admission Ceremony

Supreme Court of the
Northern Territory

Mr Matthew Dominic Webster Roso
and **Mr Thomas Ciaran Yengbie**

were both admitted to the Supreme Court of the
Northern Territory on 06/03/18

Due to technical difficulties, we are unfortunately unable to provide a photograph of this admissions ceremony.