The New Northern Territory ICAC: Better Corruption Offences, but Prevented by a Lack of Prevention

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The Northern Territory now has ICAC legislation in order to combat corruption. Consequential amendments were made to the Criminal Code to effect the new ICAC regime which involved overhauling corruption offences. However, although the ICAC can audit and review policies in public bodies, there is very little to prevent those convicted of corruption offences from re-entering positions of public confidence. The new corruption offences in the Northern Territory will be contrasted with those in New South Wales and, although it will be seen that the new corruption offences are far superior, there is very little to prevent those convicted of corruption offences from re-entering positions of public confidence. The existence (and lack thereof) of those barriers will be examined and the hurdles that may be faced in implementing such barriers.

I. Introduction

On 30 November 2018, the *Independent Commissioner Against Corruption Act 2017* (NT) (the *NT ICAC Act*) and the *Independent Commissioner Against Corruption (Consequential and Related Amendments) Act 2018* (NT) (the *Amendments*) came into effect in the Northern Territory. This legislation came into being after the Anti-Corruption, Integrity and Misconduct Commission Inquiry handed down its final report on 27 May 2016 (the *Report*).[1]

The Report made 52 recommendations.[2] Of these 52 recommendations, 50 were implemented.[3] The *NT ICAC Act* and the *Amendments* both implemented a model for the anti-corruption commission and made the necessary amendments to other laws such as the Northern Territory *Criminal Code*.[4] The Report inter alia discussed the implementation of other similar anti-corruption bodies throughout Australia and noted that there was no one model for an anti-corruption body.[5] This is understandable, given the independence of State and Territory laws which requires an approach that addresses the State or Territory's needs.

However, not all implementations of an anti-corruption body have been contemporaneous. The two subjects of this article are the approaches taken by New South Wales (NSW) in 1988 being the *Independent Commission Against Corruption Act 1988* (NSW)[6] (the *NSW ICAC Act*) and the Northern Territory's approach at the end of 2018 in the *NT ICAC Act* and *Amendments*.

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[1] Northern Territory, Anti-Corruption, Integrity and Misconduct Commission Inquiry, *Final Report* (2016).

[2] *Final Report*, n 1, 9–19 [7]–[8].

[3] Explanatory Statement, *Independent Commissioner Against Corruption Bill 2017* (NT) 1. It appears that the two recommendations not implemented (4 and 5) regarded the appointment of the Hon Bruce Lander QC as the Commissioner, as Charles Fleming QC was appointed instead: "NT Appoints Charles Fleming First ICAC", *SBS News*, 12 May 2018 <https://www.sbs.com.au/news/nt-appoints-charles-fleming-first-icac>.

[4] *Criminal Code Act 1983* (NT) Sch 1.

[5] *Final Report*, n 1, 149 [274].

[6] *Independent Commission Against Corruption Act 1988* (NSW).

There was no permanent anti-corruption body in Australia prior to the *NSW ICAC Act* and, since that time, almost 30 years have passed. With that passage of time, the conception of corruption in social consciousness has changed. The need for an anti-corruption body is no longer seen as radical[7] and seems to be a matter of concern of the public[8] given the widespread institution of anti-corruption bodies across States[9] and calls for a Commonwealth implementation as well.[10]

This article will analyse the operation of corruption offences in the Northern Territory before and after the passage of the *NT ICAC Act* and *Amendments* and compare it to the *NSW ICAC Act*. The different approaches to criminalising corruption and the ramifications for those who enter positions of public administration will be analysed and the issues involved in preventing the reoccurrence of corrupt conduct will be discussed.

II. Corrupt Conduct before the NT ICAC Act

The scope of corrupt conduct in the Northern Territory has changed as a result of the *NT ICAC Act* and the *Amendments*. Before the implementation of this legislation, corrupt conduct relating to abuse of office was contained within the *Criminal Code*. Of particular note is Div 2 which related to corruption and abuse of office. Sections 77–86 created offences for official corruption, extortion by public officers, public officers interested in contracts, officers charged with administration of property of a special character or with special duties, false claims by officials, abuse of office, corruption of a surveyor or valuer, false certificates by public officers, false assumption of authority, and personating public officers.

Before the introduction of the *NT ICAC Act* and the *Amendments* there were two noteworthy prosecutions for corrupt conduct. These two examples are *Isles v McRoberts*[11] and *R v Mossman*.[12] These cases involved allegations of official corruption and abuse of office.

A. Isle v McRoberts

Isles v McRoberts involved an informant and the Commissioner for Police for the Northern Territory. The informant, Isles, alleged that the Commissioner, McRoberts, abused his position by providing malicious advice to the Queensland Police Service, causing a detriment to Isles. The provision involved was s 82 of the *Criminal Code* which related to an abuse of office. This section provided that:

> (1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of an offence and is liable to imprisonment for 2 years.
> (2) If the act is done or directed to be done for purposes of gain he is liable to imprisonment for 3 years.

The question was whether the Commissioner was employed in the public service. If he was not employed in the public service, he could not be subject to s 82.[13] Section 4 of the *Criminal Code* defined the

[7] See, eg, WG Roser, "The Independent Commission against Corruption: The New Star Chamber?" (1992) 16 Crim LJ 225, 226.

[8] *Final Report*, n 1, 84–85 [118].

[9] *Independent Commission Against Corruption Act 1988* (NSW); *Independent Commissioner Against Corruption Act 2017* (NT); *Crime and Corruption Act 2001* (Qld); *Independent Commissioner Against Corruption Act 2012* (SA); *Integrity Commission Act 2009* (Tas); *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic); *Corruption, Crime and Misconduct Act 2003* (WA). The Australian Capital Territory does not have equivalent legislation.

[10] See, eg, Tom Stayner, "Senate Votes to Set up Federal Anti-corruption Body", *SBS News*, 9 September 2019 <https://www.sbs.com.au/news/senate-votes-to-set-up-federal-anti-corruption-body>; Christopher Knaus, "Federal ICAC: Call for Anti-corruption Body after 'Shocking' Lack of Public Trust Revealed", *The Guardian*, 17 October 2018 <https://www.theguardian.com/australia-news/2018/oct/17/federal-icac-call-for-anti-corruption-body-after-shocking-lack-of-public-trust-revealed>; Adam Gartrell, "Federal Corruption Watchdog Needed, Say 80 Per cent of Australians: Poll", *The Sydney Morning Herald*, 13 January 2017 <https://www.smh.com.au/politics/federal/federal-corruption-watchdog-needed-say-80-per-cent-of-australians-poll-20170113-gtqva3.html>.

[11] *Isles v McRoberts* [2011] NTMC 1.

[12] *R v Mossman* (2017) 322 FLR 303; [2017] NTCCA 6.

[13] *Isles v McRoberts* [2011] NTMC 1, [5].

phrase "employed in the public service" to include "employed in any Agency under the *Public Sector Employment and Management Act*, as a police officer or to execute any process of a court of justice". These categories did not appear to be limited.[14]

Further, McRoberts was not employed as a police officer or in the public service,[15] and the *Police Administration Act 1978* (NT) meant that he was not an employee under the *Public Sector Employment and Management Act 1993* (NT).[16]

"Office" in this regard simply meant the position for which a person was employed to perform. This was based on statutory interpretation and the court compared s 82 with the wording of s 77 which related to official corruption. Prior to the *NT ICAC Act* and the *Amendments*, s 77 referred to a person "being employed in the public service" *or* "being the holder of any public office". There was a clear distinction made between the two and, therefore, as s 82 only related to those employed in the public service, it did not include holders of any public office.[17]

The result of this distinction meant that a holder of public office who was not employed in the public service could not commit the offence of abuse of office. Further, as official corruption under s 77 could only be a criminal offence if committed for the purpose of obtaining a benefit for oneself or another person, any use of public office to cause a detriment to someone could not be considered official corruption under s 77 unless it was to obtain a benefit.

Ultimately, the prosecution failed as a Police Commissioner, holding public office, could never commit an offence for the abuse of that office. So long as a Police Commissioner abused their office to cause a detriment, and never to obtain a benefit, they could never commit a criminal offence under ss 77 and 82 for official corruption and abuse of office respectively. However, if someone was employed in the public service, they *could* be held accountable.

B. R v Mossman

The second case, which involved a successful prosecution, was *R v Mossman*,[18] however, this particular case involved an appeal by the prosecution against the sentence, which was dismissed. Mossman was sentenced to one-year imprisonment for an offence under s 236 of the *Criminal Code* which related to secret commissions. This section was under Pt VII Div 5 of the *Criminal Code* which involved property offences and related matters. Part VII involved non-official corruption, while Pt IV dealt with official corruption and abuse of public office.[19] The prosecution wanted Mossman's sentence to be aligned with the higher penalties under Pt IV rather than Pt VII.

Mossman was the Acting Chief of Staff and Senior Ministerial Advisor to the Minister for Community Services. He was convicted for receiving secret commissions under s 236 of the *Criminal Code* for corruptly receiving benefits from the political office's travel services provider. Due to the nature of Mossman's position, the prosecution wanted a higher penalty to reflect the nature of Mossman's position.

However, this argument was not successful. The reasons for this were similar to *Isles v McRoberts*, as the offences under Pt IV relating to official corruption could only apply to people employed in the public service or holders of public office. Despite managing the Minister's office as Acting Chief of Staff and being the Senior Ministerial Advisor, he did not hold public office. Further, although he was employed directly by the Northern Territory to be the Minister's Acting Chief of Staff and Senior Ministerial Advisor, his contract of employment was not regulated by the *Public Sector Employment and*

[14] *Isles v McRoberts* [2011] NTMC 1, [8].

[15] *Isles v McRoberts* [2011] NTMC 1, [24].

[16] *Isles v McRoberts* [2011] NTMC 1, [9]–[11].

[17] *Isles v McRoberts* [2011] NTMC 1, [18].

[18] *R v Mossman* (2017) 322 FLR 303; [2017] NTCCA 6.

[19] *R v Mossman* (2017) 322 FLR 303, 309 [21]; [2017] NTCCA 6.

Management Act 1993 (NT). As such, not only did he not hold public office, he was also not employed in the public service.[20]

Accordingly, Mossman could not commit any offence related to official corruption under Pt IV. He could only be convicted for secret commissions under Pt VII, and as such, he could only be subject to penalties under Pt VII which were less serious than penalties under Pt IV. The result of this is that Mossman was the Acting Chief of Staff who managed people employed in the public service who assisted a Minister (a holder of public office), yet he himself was held to a lower standard than the people he managed. Mossman was also a Senior Advisor to the Minister, yet he was not held to any similar standard of accountability.

C. Impetus for an ICAC in the Northern Territory

Although the Report mentioned that there was no suggestion of widespread corruption, there was a recognised "public disquiet about the integrity in the administration of public affairs" in the Northern Territory.[21] The Report also noted that there could be serious misconduct without a breach of criminal law that still affects public confidence in public administration.[22]

This certainly seems to reflect the two cases discussed above. *Isles v McRoberts* shows that a Police Commissioner could theoretically abuse their public office to cause detriment to anyone without criminal repercussions, simply because they were not employed in the public service and they did not obtain a benefit from their abuse of public office. *R v Mossman* shows that someone employed on the lowliest rung of the public service ladder will be held to higher standards of integrity and subject to more than double the maximum years of imprisonment than their manager, the Acting Chief of Staff and Senior Ministerial Advisor to the Minister of Community Services.

Given these examples,[23] among other concerns raised in the Report, there was at least a need to revise the law relating to corruption in the Northern Territory.

III. The Criminal Code Amendments

The *NT ICAC Act* and *Amendments* came into effect on 30 November 2018. The purpose of the *NT ICAC Act* was to set up the legislative regime in which the Independent Commissioner Against Corruption operates. The purpose of the *Amendments* was to make consequential amendments to related legislation such as the *Criminal Code*. Although the *NT ICAC* has broad powers to investigate matters, this article will specifically discuss the changes made by the *Amendments* to the *Criminal Code* regarding official corruption and abuse of office.

A. Definitional Amendments

The Amendment changed some definitions under s 1 of the *Criminal Code*. The five definitions for "benefit", "gain", "improper", "obtain" and "public officer" were amended. These definitions relate to Pt IV of the *Criminal Code* regarding offences against the administration of law and justice and against public authority. Part IV contained the corruption offences that were raised in *Isles v McRoberts* and *R v Mossman*.

The definitions for "benefit" and "gain" now include non-pecuniary benefits such as services, and other temporary gains, including not losing what one already has.[24] Although "benefit" is cross-referenced to the definition s 75B in Pt IV, "gain" is a general definition that affects the *Criminal Code* generally, whether or not an offence is a corruption offence. "Obtain" was added and means "to get or receive".

[20] *R v Mossman* (2017) 322 FLR 303, 311 [32]; [2017] NTCCA 6.

[21] *Final Report*, n 1, 84–85 [118].

[22] *Final Report*, n 1, 92–93 [135]–[137].

[23] See also submissions made to the Inquiry that mention *Isles v McRoberts* [2011] NTMC 1.

[24] See also Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017* (NT) 3 regarding cl 8.

"Improper" is cross-referenced to the definition in s 75C in Pt IV and relates to when conduct is "improper" and warrants criminal sanction. This will be discussed later in this part.

The biggest shift in definitions is the standardised usage of the terms "public officer" and "public body" which were designed to replace the terms "employed in the public service" and "holder of any public office".[25] "Public officer" is cross-referenced to s 4 of the *NT ICAC Act*, which itself cross-references to s 16(2) of that Act. It includes a wide range of officers, including officers or employees of a "public body".[26] This definition of a "public body" under s 16(1) encompasses a wide range of public bodies which may also include, for example, private persons and bodies that receive public resources.[27]

With these wide definitions of "public officer" and "public body", there is no longer any artificial distinction between employees and office holders, and the updated offences reflect this new approach. This has a substantial effect on the cases of *Isles v McRoberts* and *R v Mossman* which will be reviewed later.

B. Offence Amendments

The *Amendments* affected Pt IV Divs 1–2 of the *Criminal Code*. Division 1 originally addressed disclosing official secrets, and Div 2 concerned corruption and abuse of office. The effect of the *Amendments* was to repeal these sections and redraft them under a consolidated Div 1 concerning disclosure of confidential information and corruption and abuse of office. Only official corruption and abuse of office will be dealt with here.

Subdivision 1 addresses interpretation and contains definitions as discussed above. As foreshadowed earlier, the definition of "improper" in s 75C serves to define when conduct is improper and thus warrants criminal sanction. This is important as improper conduct forms a standard element for some of the new offences under subdiv 2. Whereas previous offences referred to acting "corruptly" or "in abuse of the authority of his office", this new definition of "improper conduct" serves to provide a standard across the corruption offences.[28]

This definition of improper conduct excludes conduct that does not warrant criminal sanction and is only trivial or has only caused minimal damage to the public interest. This ties in with s 75D which allows proceedings to be dismissed if an offence is trivial or merely technical in nature. The justification for this is that improper conduct may range from very serious corruption to errors of judgment by new employees. With this range, it is designed to capture improper conduct worthy of criminal sanction while also not applying to low-level conduct not viewed as criminal or corrupt by the public which should instead be addressed by performance management.[29]

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[25] Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017* (NT) 4 regarding cl 9.

[26] The definition of "public officer" under *Independent Commissioner Against Corruption Act 2017* (NT) s 16(2) includes: a minister; a Member of the Legislative Assembly; a judicial officer; the holder of an office established under an Act who is appointed by the Administrator or a minister; a member, officer or employee of a public body; and any other person engaged, whether under the *Contracts Act 1978* (NT) or otherwise, by or on behalf of a person mentioned above in relation to the performance of official functions. However, under s 16(3), ICAC staff are excluded from this definition.

[27] The definition of "public body" under *Independent Commissioner Against Corruption Act 2017* (NT) s 16(1) includes: an Agency; a local government council; the Police Force; a court; a board, commission, tribunal or other body established under an Act that has judicial or quasi-judicial functions in the performance of its deliberative functions; a body, whether incorporated or not, established under an Act; a body whose members, or a majority of whose members, are appointed by the Administrator or a minister; a government owned corporation; a nursing home; a public hospital; a university; any other body, whether incorporated or not that receives, directly or indirectly, public resources, or performing a public function on behalf of the Territory, a public body or a public officer (whether under contract or otherwise).

[28] Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017* (NT) 4 regarding cl 9.

[29] Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017* (NT) 4–5 regarding cl 9.

Section 77 is the main corruption offence. It contains two offences: one for a public officer who intentionally requests or knowingly obtains a benefit, and one for a person who intentionally offers or gives a benefit to a public officer. In both cases, the conduct must be improper, and the benefit received or given falls afoul of this section if it is an inducement or reward, but the provision regarding reward differs. Whereas a public officer must know the reward is for having performed their powers or functions in a particular way or for a particular result, a person who gives the benefit need only knowingly give that benefit as a reward without requiring the public officer to have acted in any particular way. In either case, both offences attract the same maximum penalty of 10 years' imprisonment.

However, if for any reason a finder of fact is not satisfied beyond reasonable doubt that an offence has been committed under s 77(1) of the *Criminal Code*, then a finder of fact, if satisfied beyond reasonable doubt, may find that the person is guilty of another corruption offence under Pt IV Div 1. This means that, if a person is prosecuted under s 77(1), it is not necessary for the person to also be charged alternatively under other sections, as the finder of fact may, if satisfied beyond reasonable doubt, find the person guilty for another corruption offence. This gives flexibility to aid in the prosecution of corruption offences.

Section 78 follows on from s 77 in that it concerns other corrupting benefits. This section operates in much the same way, however, the main distinction here is that, while s 77 concerns benefits that *are* rewards or inducements, s 78 concerns benefits that would *tend* to be rewards or inducements. The offences under s 78 have the same maximum penalty of 5 years' imprisonment, but the maximum penalty is only half that of s 77. It appears that s 78 is designed to criminalise improper conduct that would *tend* to be viewed as corrupt, whether or not the public officer *has* acted corruptly. This benefit of this is that there is no need for the benefit to be causally linked to any particular identifiable corrupt conduct.[30]

Section 81 updates the previous offence of abuse of office. If a public officer intentionally engages in improper conduct which is intentionally arbitrary or an abuse of process and is also recklessly prejudicial to the rights of another person, an offence is committed. The maximum penalty is 2 years' imprisonment. If such conduct was done with the intention of obtaining a benefit, then the maximum penalty is 3 years' imprisonment.

The arbitrary and prejudicial conduct contemplated by s 81 must be intentional. It was designed in this manner to avoid criminalising conduct in which poor processes have led to arbitrary conduct, which is better redressed by disciplinary action.[31]

Importantly, s 81 regarding abuse of office has been split into two offences. Under the old offence of abuse of office, such an abuse must have been done to obtain a benefit to be considered criminal. Under this new offence, gain is not relevant – arbitrary and prejudicial conduct, whether or not it results in a benefit, is a criminal offence. However, if such conduct *was* done to obtain a benefit, then a higher maximum penalty applies.

C. Summary and Effect of the NT Amendments

The effect of the *Amendments* in relation to the *Criminal Code* is to provide an overhaul of corruption offences in the Northern Territory and to provide harmonised standards across these offences. This standardisation has been achieved both by standardising definitions and by consolidating corruption offences.

The definitional changes include changing the definition of "gain" to include non-pecuniary gains, which also affects other unrelated parts of the *Criminal Code*. It also provides a definition of "improper" in relation to improper conduct. This is to provide courts with guidelines to determine when conduct is improper, and thus deserving of criminal sanction. This also serves to separate conduct which is trivial or merely incompetent from serious instances of corruption, which would instead be better redressed through public bodies developing appropriate processes and guidelines. The *Amendments* also works

[30] Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017* (NT) 7–8 regarding cl 9.

[31] Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017* (NT) 9 regarding cl 9.

with the *NT ICAC Act*, as the ICAC has the power to ensure that public bodies develop appropriate guidelines and processes.

Other definitional changes also include the *NT ICAC Act* itself, under which s 16 provides the definitions of "public officer" and "public body" which replaces the previous definitions of "employed in the public service" or "holder of any public office".

This latter definition change is important for the consolidation of corruption offences. Unless the section specifically states that it applies to only specific types of public officers, the new offences relate to the new broad definition of a public officer and others who may attempt to corrupt public officers.

The type of conduct now criminalised also covers a wider range of corrupt conduct. Whereas under the previous *Criminal Code* a holder of public office could abuse their position arbitrarily to damage anyone so long as they did not gain a benefit, this is no longer the case. Any arbitrary or prejudicial conduct taking in the course of carrying out one's public office is now criminalised, but the penalty is higher if there *is* a benefit obtained by doing so.

Further, because of the broad definitions that now apply to "public officer" and "public body", people who previously could never be subject to the corruption offences under Pt IV of the *Criminal Code* are now covered by those corruption offences. These points can be demonstrated by reconsidering the cases of *Isles v McRoberts* and *R v Mossman*.

1. Isles v McRoberts

As discussed, this concerned an informant, Isles, and the Police Commissioner, McRoberts. It was alleged that McRoberts used his position to give malicious advice to the Queensland Police Service, thereby causing a detriment to Isles.

This conduct was alleged to constitute a crime under the previous s 82 of the *Criminal Code*. This offence concerned people employed in the public service. As discussed earlier, McRoberts was not employed in the public service, thus the charge could never be made out as a Police Commissioner could not, by definition, commit an abuse of office. However, being a public officer, he could have been amenable to s 77 regarding official corruption, which does include those who hold any public office rather than only those employed in the public service. However, conduct could only fall afoul of s 77 if there was an element of receiving a benefit, which was not the case. It was, in layman's terms, an abuse of office, but by its nature, the offence could not be committed by holders of public office.

The new offences that may be applicable under the *Criminal Code* by virtue of the *Amendments* are ss 80 and 81 regarding abuse of office, both involving dishonesty, and arbitrary and prejudicial conduct, respectively.

Both of these offences may be committed by a "public officer" only. Section 16(2)(d) of the *NT ICAC Act* provides that "public officer" includes "the holder of an office established under an Act who is appointed by the Administrator or a minister". Section 7 of the *Police Administration Act 1978* (NT) provides that a Police Commissioner is appointed by the Administrator. A Police Commissioner then fits the definition of a "public officer".

This is one important difference between the old and new sections of the *Criminal Code* regarding abuse of office. Although it seems trite to say, a holder of public office can now be liable if they commit an abuse of that office, and it is no longer relegated to people employed in the public sector.

McRoberts' conduct, if proven, could potentially fall foul of either of ss 80 or 81. For example, under s 80, if the "malicious advice" was a document that contained false particulars about Isles' rights, then the offence could be proved. On the other hand, perhaps the more appropriate section is s 81 regarding arbitrary and prejudicial conduct. If it could be shown that McRoberts' conduct was intentionally arbitrary or an abuse of process, prejudicial to Isles' rights, then that would constitute an abuse of office.

2. R v Mossman

As discussed, this case concerned an Acting Chief of Staff and Senior Ministerial Advisor. The prosecution appealed the sentence, arguing that his sentence should have been increased in line with the corruption offences in the previous Pt IV, given the serious nature of Mossman's position. However, s 77

concerning official corruption only applied to people employed in the public service or holders of any public office. Mossman was not employed in the public service, and he did not occupy any public office. Instead, he was simply contracted by the Northern Territory. This led to the curious result of an Acting Chief of Staff and Senior Ministerial Advisor being held to a lower standard of accountability than the people he managed.

Under the new s 77, the offence of corruption may be committed by a public officer. Under s 16(2)(f) of the *NT ICAC Act*, a "public officer" includes "any other person engaged, whether under the *Contracts Act* or otherwise, by or on behalf of a person mentioned in paragraphs (a) to (e) in relation to the performance of official functions." Section 16(2)(a) mentions that "a minister" is one such person. As Mossman was so contracted in relation to the performance of official functions, he would be considered a "public officer", despite not holding any public office nor being employed in the public service. As such, he would now be held to at least the same level of criminal accountability in relation to corruption as the staff he managed had been.

IV. Comparison of NT and NSW Corruption Offences

Corruption offences in New South Wales are contained within Pt 4A of the *Crimes Act 1900* (NSW) (*Crimes Act*) under ss 249A to 249J. The *Crimes Act* takes a different approach to corrupt conduct compared to the Northern Territory *Criminal Code*. The equivalent sections to the Northern Territory's ss 77, 78, 80, and 81 will be considered.

A. Definitions

Section 249A contains the definitions for the corruption offences. These two definitions in this section relate to "agent" and "benefit". "Benefit" includes "money and any contingent benefit", but this is not limited to only pecuniary benefits.[32]

It is the definition of "agent" which is of interest. Whereas the *Amendments* introduced the more general term "public official" to the Northern Territory *Criminal Code*, the New South Wales *Crimes Act* has a general definition of "agent". This definition includes: anyone acting on behalf of another in any capacity (or purporting or intending to be); any person serving under the Crown; a police officer; a councillor of a local government, or a councillor or board member of a local aboriginal land council.

This is an important definition as the corruption offences under Pt 4A of the *Crimes Act*, when they refer to an "agent", may also encompass acts between private individuals with no connection to any "public officer" within the meaning of the *NT ICAC Act*.[33] However, because it *does* include "any person serving under the Crown", the offence does relate to official corruption as well. This just means that a corruption offence may be committed without it relating to public administration or requiring an offender to hold any position of public office or be employed in the public service.

B. Offences

Section 249B concerns corrupt commissions or rewards. This provision is similar to ss 77 and 78 of the Northern Territory *Criminal Code*. Section 249B contains two offences: one for an agent who corruptly receives a benefit, and one for a person who corruptly gives a benefit. In order for either offence to be shown, a benefit must be corruptly taken or given, either as a reward or inducement for acting in a specific way, or by showing specific favour in relation to the agent's position. This is very similar to s 77 of the Northern Territory *Criminal Code*, however, s 249B of the *Crimes Act* also provides that the offence may also be shown if said benefit would *tend* to influence the agent. This reflects s 78 of the Northern Territory *Criminal Code*.

There are two differences between the approaches in New South Wales and the Northern Territory. The first difference relates to sentence. While ss 77 and 78 of the Northern Territory *Criminal Code*

[32] See, eg, *Pereira v The Queen* [2018] NSWCCA 171; *New South Wales Crime Commission v Cresnar* [2015] NSWSC 1304.

[33] See, eg, *Mehajer v The Queen* (2014) 244 A Crim R 15; [2014] NSWCCA 167.

provide a maximum of 10 years' and 5 years' imprisonment for actual corruption and tending to corrupt respectively, s 249B of the New South Wales *Crimes Act* provides a maximum sentence of 7 years' imprisonment, whether or not it is actual corruption or tending to corrupt.

The second difference refers to the definition of the conduct involved. In the Northern Territory *Criminal Code*, corruption offences require conduct to be improper. Section 75C of the Northern Territory *Criminal Code* provides a comprehensive definition of "improper" conduct. Particularly, conduct is "improper" in the Northern Territory if it warrants criminal sanction in the circumstances. There is an amount of discretion afforded to finding whether conduct is improper, but there are guidelines. If conduct warrants criminal sanction, then it *must* be found to be improper, unless the conduct is trivial or has caused only minimal damage to the public interest, and if the finder of fact is satisfied that criminal sanction is not warranted in the circumstances.

However, the circumstances that warrant criminal conduct that must be considered are set out in s 75C(3). These circumstances include: whether the person is a public officer and if they have behaved as reasonably expected by a public officer in that position; and if not a public officer, whether the person behaved in a way reasonably expected of them; whether they acted in an honest and reasonable belief that they were lawfully entitled to act in that way; the seriousness of the conduct and any result thereof; and whether it was isolated, part of repeated similar conduct, or as part of a course of conduct.

The Northern Territory approach is different than the NSW approach. The NSW offences require a benefit to be given or received "corruptly". The *Crimes Act* does not define what it means for a benefit to be given or received "corruptly", and although the *NSW ICAC Act* in ss 7–9 does provide definitions of corrupt conduct, including its general nature and limitations, that definition is for the purposes of the *NSW ICAC Act*.

As such, there is no statutory definition for what it means to act "corruptly" for the NSW corruption offences and is left to case law to decide. Acting "corruptly" may include "acting with some wrongful intention" or "purposely doing an act which the law forbids as tending to corrupt".[34] However, it is not necessary for the benefit received to be hidden by the agent from their principal.[35]

The issue here is that s 249B of the *Crimes Act* relates to corruption in general, not corruption of public officers specifically. The benefit of the Northern Territory's approach is that "improper conduct" is clearly defined and *must* be found unless there is a reason to *not* find that the conduct was improper. Given the serious nature of corruption of public officers, there is certainly an argument to be made for dealing with official corruption specifically, although that does not necessarily mean that the NSW approach is insufficient.

Section 249C of the *Crimes Act* concerns agents who create false or misleading documents or statements in order to defraud their principal. Again, this section is affected by the fact that it applies to agents and principals generally and does not specifically target public officers. The equivalent section in the Northern Territory is s 80 of the *Criminal Code*. The difference here, apart from the maximum penalty, is that the Northern Territory offence does not require the agent to have acted improperly for the purpose of defrauding their principal. Rather, the Northern Territory offence relates to false documents that affect the expenditure of public money or the rights of a person. This means that s 80 of the *Criminal Code* may apply if a false or misleading document or statement affects the rights of a person, regardless of the relation of the offender to that person.

This offence notes the affect that an abuse of office may have on the rights of individuals in that such an abuse does not need to be done for personal gain or to defraud someone – false documents and certifications may be done simply to disadvantage someone without any consequent benefit. One advantage s 249C of the *Crimes Act* has over the Northern Territory offence under s 80 of the *Criminal Code* is that it also includes false or misleading statements, not only documents. However, s 81 of the Northern Territory *Criminal Code* also concerns the use of one's office in an arbitrary way or as an

[34] *Ripperger v Kelly* [2014] NSWSC 584, [52]. See also *R v Gallagher* [1986] VR 219; (1985) 16 A Crim R 215; *R v Dillon* [1982] VR 434.

[35] *R v Jamieson* [1988] VR 879; (1987) 34 A Crim R 308, 312–313 (Young CJ).

abuse of process that is prejudicial to the rights of another person. Although s 80 only involves false documents, and not false statements, such false statements could be considered improper conduct as an intentional abuse of process.

C. Consequences

Despite the jurisdictional differences, the approaches between the Northern Territory and New South Wales are similar. However, whereas the approach in the Northern Territory was designed specifically to counteract official corruption given the findings of the Report, the approach in New South Wales is not so specific. An example of this is that there is no distinction between "official" and "non-official" corruption: there is only corruption, whether or not it is perpetrated by a public official or a member of the public who has no connection to public administration.

This broad approach has ramifications for the prevention of corruption. In particular, there is one provision in New South Wales that the Northern Territory lacks. This is s 249H which disqualifies those convicted of corruption offences from holding civic office. Because of the broad approach, those convicted of corruption in New South Wales are subject to s 249H, and unlike the Northern Territory, it matters not whether it was "official" or "non-official" corruption. This deserves to be specifically addressed.

V. An Institutional Bar or Disqualification for Corruption?

Although the new Northern Territory corruption offences are much better than the previous offences, the question to be asked is whether this is enough to combat corruption. On the face of it, they are not sufficient – otherwise the NT ICAC would not have been created with the powers and functions it possesses, and only the Amendment to the *Criminal Code* would have sufficed.

In order to prevent corruption from festering in public administration,[36] it would seem axiomatic to prevent those persons convicted of corruption offences from entering a position of public confidence. It appears intended that, in addition to creating a more robust set of corruption offences, the NT ICAC is designed to not only investigate corrupt conduct but to also develop practices, policies and procedures to ensure that a culture of corruption does not persist in public bodies.[37] This is evidenced by the definition of "conduct" under s 8 of the *NT ICAC Act*. Amongst other things, a public body engages in conduct if "a corporate culture exists in the public body that directs, encourages, tolerates or leads to [the conduct] occurring" or if "the public body has failed to create and maintain a corporate culture to deter or prevent [the conduct] occurring".

If the corporate culture in a public body directs, encourages, tolerates or leads to conduct occurring which is improper, then the ICAC may audit the public body's practices, policies or procedures.[38] A report may be made in relation to this audit[39] and recommendations may be made.[40] The subject of the report must respond with what steps will be taken in light of the recommendations, and if the ICAC is not satisfied that adequate steps have been taken to implement the recommendations, the ICAC may submit a report to the responsible Minister for the public body (or if the public officer is the Minister, that Minister).[41] If no response is received, the ICAC may make a report to the ICAC Minister and the ICAC Minister must table this report in the Legislative Assembly.[42]

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[36] In relation to the large amount of complaints received by the NT ICAC, see, eg, "NT ICAC Commissioner Receives 'Serious Allegations' of Corruption within Public Service", *ABC Radio Darwin*, 5 December 2018 <https://mobile.abc.net.au/news/2018-12-05/icac-nt-commissioner-ken-fleming-corruption-allegations-public/10584840?pfm=sm&src=ilaw>; Office of the Independent Commissioner Against Corruption, "The First 100 Days – ICAC Report" (Media Release, 14 March 2019) 3.

[37] *Independent Commissioner Against Corruption Act 2017* (NT) s 18.

[38] *Independent Commissioner Against Corruption Act 2017* (NT) s 23.

[39] *Independent Commissioner Against Corruption Act 2017* (NT) s 48.

[40] *Independent Commissioner Against Corruption Act 2017* (NT) s 56.

[41] *Independent Commissioner Against Corruption Act 2017* (NT) s 57.

[42] *Independent Commissioner Against Corruption Act 2017* (NT) s 58.

From there, the ICAC has no further power to effect any change. However, what happens after a public officer is convicted of a corruption offence? May they resume employment in the public service or reoccupy the public office they once held? This is not within the purview of the *NT ICAC Act* and the *Amendments*, nor does the Report address this question. Instead, the focus seems to be on overhauling the corruption offences in the Northern Territory and focusing on those employed in the public service. This focus seems oddly misdirected, especially given that *Isles v McRoberts* and *R v Mossman* explicitly involved allegations of corruption where those involved *were not employed in the public service*. While it is true that there were definitional problems that led to these results, those two important cases involved people appointed under statute and directly employed by the Northern Territory. Why is there such a focus on those employed in the public service, despite two important cases of alleged corruption involving people who were not employed in the public service?

As the *NT ICAC Act* addresses prevention of corruption in the public service, the issue of preventing those convicted of corruption from entering positions of public confidence should still be addressed. The forms of disqualification from these roles in the public service and in public office will both be examined in the Northern Territory and will then be contrasted with the approach in New South Wales.

A. North Territory Disqualification

The ICAC's powers to effect changes in the corporate culture of public bodies is limited, as if the public body does not agree, it is the responsibility of the relevant Minister or the Legislative Assembly to effect that change. Given the scope of the ICAC's powers to effect changes in corporate culture of public bodies, this should be backed up by a system that prevents persons convicted of corrupt conduct from re-entering those public bodies and perpetuating that culture.

1. Public Office

Currently there is no permanent disqualification from any elected public office in the Northern Territory for anyone convicted of corruption offences. Under the *Local Government Act 2008* (NT) s 37(1)(c) disqualifies persons from being a member of a local government council if they have been sentenced to a term of imprisonment of one year or more which has not been served. In much the same way, election to the Legislative Assembly is similarly restricted. Although there is no specific disqualification from nomination under the *Electoral Act 2004* (NT), under s 21(1)(c) of the *Northern Territory (Self-Government) Act 1978* (Cth), a person is disqualified from being a member of the Legislative Assembly if they have been convicted and "is under sentence" for one year's imprisonment or longer.

This means that, if anyone has been convicted of an official corruption offence under the *Criminal Code*, they are able to be a member of a local government council or the Legislative Assembly if they have been sentenced to imprisonment for less than one year, or if greater than one year, once that sentence has expired. Although there is a code of conduct, this only applies to those who have already been elected as a member of local government[43] or the Legislative Assembly.[44]

The important point to note is that these disqualifications only relate to the actual sentence received by the person and only apply while that sentence remains unexpired. If a person is convicted for an official corruption offence and is sentenced to more than one year's imprisonment, then so long as they serve their sentence, they are free to seek election to the Legislative Assembly or a local government council. Curiously, if for some reason the person has been convicted but receives a penalty of less than one year's imprisonment, then no disqualification exists at all – despite being under sentence for official corruption, because it is less than one year, they are free to seek election to the Legislative Assembly or a local government council.

However, these disqualifications only relate to those elected positions, and not to other public offices which are not elected but do not form part of the public service. For example, the Police Commissioner is not a public servant nor an elected position, as they are appointed by the Administrator. At this stage,

[43] *Local Government Act 2008* (NT) Sch 2.

[44] *Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act 2008* (NT).

beyond any recommendations that the ICAC may make regarding practices, policies and procedures, the appointment of people to a public office is at the discretion of the appointor, unless subject to some legislative or regulatory provision that governs that particular appointment.

2. Public Service

Employees in the public service under the *Public Sector Employment and Management Act 1993* (NT) are not disqualified from entering the public service by any conviction for a criminal offence. Instead, a "breach of discipline" may occur when someone who is already an employee commits an offence that affects their employment under s 49(b) which may lead to disciplinary action under s 49C or summary dismissal under s 50. There is no explicit disqualification from being employed due to any conviction of a corruption offence – that disqualification may only occur after being employed.

Persons convicted of official corruption may only be denied employment in the public sector if the public body's practices, policies and procedures address how that is to be dealt with. However, if that public body has a corporate culture that falls short of complete non-tolerance of corrupt conduct, then persons convicted of official corruption offences may re-enter the public service in public bodies whose corporate culture may tolerate corruption. The ICAC may only make recommendations to fix such a corporate culture which, if ignored, will be left up to the relevant minister or Legislative Assembly to resolve, if at all.

There is significant difficulty in preventing people from seeking employment in the public service based on their criminal record, which impacts how a public body's practices, policies and procedures may be developed and applied. One example is that discriminating against a person based on their criminal record may not be relevant to their employment and could constitute a breach of their human rights.[45] Discrimination on the basis of an "irrelevant criminal record" is also prohibited in the Northern Territory under s 19 of the *Anti-Discrimination Act 1992* (NT) unless it falls into the narrow exemption in s 37 regarding work with vulnerable persons. Otherwise, an "irrelevant criminal record" may include spent convictions under s 6 of the *Criminal Records (Spent Convictions) Act 1992* (NT). A conviction becomes spent, in most cases, after the expiry of 10 years unless it has been extended due to any other offence.

These are not idle concerns, as rehabilitation and recidivism are vital issues.[46] People have a right to seek work.[47] However, these issues must also be balanced with the inherent requirements of employment in the public service.[48] No issue is taken with the prohibition of discrimination against persons with criminal records in general. The issue here is whether a criminal record *specifically related to corruption offences* under Pt IV should disqualify potential applicants to the public service.

An exemption for discrimination in this regard is contained in s 35 of the *Anti-Discrimination Act 1992* (NT). Under s 35(1)(b)(ii), discrimination in work is lawful if it is based on the person's "inability to adequately perform the inherent requirements of the work even where the special need of the other person has been or were to be accommodated". If a conviction has not been spent, then a conviction for an official corruption offence may be considered when seeking a position involving public administration if that conviction may otherwise reflect on that person's ability to perform in that position of public administration.

The benefit of the new official corruption offences in the Northern Territory is that "improper conduct" is a necessary element, and all of these offences relate to public administration. A conviction for an official corruption offence must necessarily find that the improper conduct in question was worthy of criminal sanction and was not merely trivial or only caused minimal damage to the public trust in public

[45] See *Australian Human Rights Commission Act 1986* (Cth); "Discrimination in Employment on the Basis of Criminal Record" (Discussion Paper, Human Rights and Equal Opportunity Commission, December 2004).

[46] See, eg, Rebecca Bradfield, "Sentences without Conviction: Protecting an Offender from Unwarranted Discrimination in Employment" (2015) 41(1) *Monash University Law Review* 40.

[47] See *Commonwealth v Human Rights and Equal Opportunity Commission* (1999) 167 ALR 268, 284 [35]–[36] (Black CJ); [1999] FCA 1524.

[48] "Discrimination in Employment on the Basis of Criminal Record", n 45 17–27.

administration. These elements of corruption offences go to the heart of public administration and, in some respect, must be relevant to considering whether a person convicted of those corruption offences can adequately perform to the standard required of public administration.[49]

However, despite the commission of those offences necessarily involving criminal behaviour related to public administration, the problem is that there are many types of employment positions in the public service which have varying opportunities for corruption. It must be remembered that the NT ICAC is to give priority to serious offences[50] and that the Amendment to the *Criminal Code* is meant to criminalise conduct worthy of criminal sanction and not breaches that could be addressed by a disciplinary approach.[51] For example, if someone was convicted under s 78 for giving a benefit that would tend to corrupt, would this offence affect the inherent requirements of that person being employed in the public service to perform gardening work? Would a conviction for official corruption be incompatible with being employed to tend to public gardens? Nuance must be shown in determining whether a conviction for official corruption affects the inherent requirements of the job being applied for in the public service.[52] A blanket ban may adversely affect those with a criminal record without benefitting the public service in any way.

3. Two-fold Problem

The problem with the approach in the Northern Territory is two-fold. The first relates to the election and appointment of public officials, and the second relates to those employed in the public service and any corporate culture in the public service.

For the first problem, there is only a general disqualification from being elected to public office when convicted of a corruption offence. There is no general disqualification from any appointment to public office made under any Act. Further, the only disqualification present in relation to a local government council or the Legislative Assembly is if a person has been charged and convicted for any offence and if the sentence is one year's imprisonment or more. If they were sentenced to an amount less than one year's imprisonment, then no disqualification provision in either the *Local Government Act 2008* (NT) or the *Northern Territory (Self-Government) Act 1978* (Cth) applies at all.

The second problem is that people cannot be disqualified in general from being employed in the public service due to their criminal record. This is a problem if a public body has a culture that tolerates corruption, as if the ICAC's recommendations are not implemented or otherwise acted upon by the Legislative Assembly, no change can be made. Further, it is illegal to discriminate against someone on the basis of their criminal record unless that criminal record inherently affects the carrying out of the requirements of their job. Although a specific disqualification for the corruption offences under Pt IV might be suitable, there still needs to be nuance in this area to ensure that any disqualification for corruption is proportionate to the offence committed and the inherent requirements of the specific job being applied for. Unfortunately, the Anti-Corruption, Integrity and Misconduct Commission Inquiry's Final Report did not have any of these questions within its scope.

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[49] The exact form of how those practices, policies and procedures regarding suitability is not a clear-cut manner, especially given the varied roles present in the public sector. See Chris Wheeler, "Ethics in the Public Sector – Clearly Important, But…" (2014) 77 *Australian Institute of Administrative Law Forum* 19.

[50] *Independent Commissioner Against Corruption Act 2017* (NT) s 18(3)(a).

[51] *Criminal Code* ss 75C–75D; Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017* (NT) 4–5 regarding cl 9.

[52] See, eg, "Reports of Inquiries into Complaints of Discrimination in Employment on the Basis of Criminal Record – Ms Renai Christensen v Adelaide Casino Pty Ltd" (HREOC Report No 20, Australian Human Rights Commission, 2002) where it was held that Ms Christensen was discriminated against by being denied work as a bartender due to a juvenile conviction seven or eight years prior to seeking employment as a bartender. See also *Commonwealth v Human Rights and Equal Opportunity Commission* (1999) 167 ALR 268; [1999] FCA 1524.

B. New South Wales Disqualification

The approach in the Northern Territory can be directly compared to the approach taken in New South Wales. Unlike the Northern Territory, people convicted of corruption offences are subject to more onerous disqualifications.

1. Public Office

Of particular note here is that there is no specific offence of "official" corruption in New South Wales: instead, there is a general corruption offence which also includes official corruption. This is contained within Pt 4A of the *Crimes Act*.

The corruption offence under the *Crimes Act* is s 249B which concerns corrupt commissions or rewards. It is similar to ss 77 and 78 of the *Criminal Code* and criminalises conduct on behalf of both the giver of the corrupt benefit and the receiver of the corrupt benefit. However, instead of "public officers" or "public bodies", s 249B deals with "agents". Rather than a public officer receiving a benefit corruptly, s 249B makes it an offence for an agent to receive a benefit corruptly.

Section 249A defines "agent" as including anyone acting on behalf of another in any capacity, a person serving under the Crown, a police office, and a councillor of a local government or board member of a local aboriginal land council. Although this definition does include persons who would otherwise be public officers in the Northern Territory, it also encompasses private persons in private dealings with no connection to public administration.[53]

This is important, as disqualification in New South Wales does not make any distinction between official and non-official corruption. An example of this is s 249H which explicitly disqualifies anyone from holding civic office under the *Local Government Act 1993* (NSW) for up to seven years if they have committed a corruption offence. A person is disqualified even if their corruption offence is a purely private matter and has no connection to public administration.

The above period of disqualification is related to the maximum penalty for the corruption offences in New South Wales, which is seven years' imprisonment. This is important as, unlike the Northern Territory, disqualification in New South Wales for either House of Parliament relates to the *maximum* penalty for the offence they have been convicted of. Disqualification from being a member of State government is covered by s 13A(1)(e) and (2) of the *Constitution Act 1902* (NSW). If a person is convicted of an offence punishable by five years' imprisonment or more and has not appealed within time or the conviction has not otherwise been quashed, then that person's seat in either House of Parliament is vacated. If that would otherwise apply to someone who seeks to be nominated to either House of Parliament, then s 83 of the *Electoral Act 2017* (NSW) operates to disqualify that person from nomination.

As the NSW corruption offences carry a maximum penalty of seven years' imprisonment, any person convicted of a corruption offence will be permanently disqualified from either House of Parliament. Unlike local government, this disqualification is not time-limited, but convictions may become spent as will be discussed below.

2. Public Service

Like the Northern Territory, there is no disqualification from being employed in the public service for corruption offences. Unlike the Northern Territory, New South Wales' *Anti-Discrimination Act* 1977 (NSW) does not protect persons from discrimination based on an irrelevant criminal record, however, spent convictions under s 12 of the *Criminal Records Act 1991* (NSW) are not to be included in a person's criminal history and the Human Rights Commission may still apply.[54]

Government employees may be suspended in two ways under s 70 of the *Government Sector Employment Act 2013* (NSW) which regards misconduct, criminal charges and corrupt conduct. The first is if the government employee is convicted of an offence punishable by at least 12 months' imprisonment. The second is if the NSW ICAC has made a finding of corrupt conduct against a government employee or is

[53] See, eg, *Mehajer v The Queen* (2014) 244 A Crim R 15; [2014] NSWCCA 167; *Pereira v The Queen* [2018] NSWCCA 171.

[54] See *Australian Human Rights Commission Act 1986* (Cth).

conducting an investigation that may lead to such a finding. Although these are not disqualifications, they do act after the fact in a way similar to the Northern Territory approach

3. Summary

As the corruption offences in Pt 4A of the *Crimes Act* all carry a maximum penalty of at least seven years' imprisonment, any person elected to public office will be disqualified from that position. However, this does not prevent people from being employed in the public service, and it only affects those seeking to be elected to civic office in local government for seven years. It is only those seeking to be elected to either House of Parliament in New South Wales who may be disqualified until that conviction becomes spent.

The specific benefit of the NSW approach is that corruption relates to "agents" and "principals" and may encompass private dealings with no public aspect whatsoever. This means any form of corruption in a non-official capacity may disqualify those persons as discussed above.

However, the specific benefit mentioned above is also a detriment when attempting to disqualify persons convicted of corruption offences from being employed in the public service. The official corruption offences in the Northern Territory involve elements of improper conduct which, by definition, are not merely trivial or only damage public confidence in a minor way. The offences also directly relate to public administration. In comparison, the approach in New South Wales is problematic as it contains a general corruption offence without a distinction between official and non-official corruption. Without knowing what the facts and circumstances of the conviction relate to under s 239B of the *Crimes Act*, the distinction between official and non-official corruption cannot be made and it will be harder to discern whether that conviction for corruption is or is not compatible with being employed in the public service.

VI. Conclusion

Although it is still early days for the Northern Territory ICAC, the high volume of complaints made in that short amount of time shows that the introduction of an ICAC was needed. The implementation of an ICAC has been assisted by an overhaul of corruption offences. These offences under Pt IV of the *Criminal Code* now cover a wider range of potential offenders. This has been done by removing the artificial distinctions between those employed in the public service and those who occupy a public office, and by introducing a general definition for public officers and public bodies that more accurately reflects the true nature of persons and bodies that are involved in public administration. Had these changes been in effect a decade ago, the absurd circumstances in *Isles v McRoberts* and *R v Mossman* would never have arisen.

However, this overhaul of the corruption offences is not enough to combat corruption. This article examined institutional barriers for those convicted of corruption offences from re-entering public positions. In this regard, the ICAC may audit practices, policies and procedures and make recommendations, but these recommendations cannot be enforced by the ICAC. If the subject of the ICAC's recommendations declines to implement those recommendations, it is up to the relevant Minister or Legislative Assembly to effect those changes.

Because of the scope of the ICAC's powers, more should be done in order to create institutional barriers to prevent those convicted of corruption offences from resuming their corrupt conduct in elected positions. The approach in New South Wales is to disqualify persons convicted of corruption offences from being elected to public office. For local government, a person is disqualified for seven years, and for either House of Parliament in New South Wales, they are disqualified until that conviction becomes spent. The benefit here is that the disqualification in the case of local government is unconditional if a corruption offence has been committed, and in the case of State government, the disqualification operates if the maximum penalty for the offence convicted is above a certain threshold. As the corruption offences in New South Wales pass this threshold, the disqualification for corruption offences is practically unconditional.

This is not the case in the Northern Territory. For elected positions in local or Territory government, no person is disqualified from seeking election unless they have been sentenced to one year's imprisonment or more. However, if that sentence has been served or they were otherwise sentenced to less than one

year's imprisonment, then their eligibility is not affected. They may seek re-election after serving their sentence for corrupt conduct and there is no barrier for doing so. This should be addressed in a manner similar to New South Wales where either a specific disqualification for committing a corruption offence should exist, or at least a disqualification that is based upon the maximum sentence for the offence committed, rather than the actual sentence received. Again, given that convictions may be spent, this would no longer be an issue once that conviction becomes spent.

The issue of persons convicted of corruption offences being employed in the public service is more complex. Discrimination based on spent convictions is prohibited, and discrimination based on an irrelevant criminal record may breach that person's human rights. This is because, even though someone may have been convicted of a corruption offence, not every position in the public service has the same potential for serious corrupt conduct. This is particularly so where private individuals and bodies may be deemed to be public officers or public bodies in certain scenarios. This is a relevant concern given the ICAC's priority is to address serious corrupt conduct and that improper conduct under the corruption offences must be worthy of criminal sanction.

If discrimination against persons being convicted of corruption offences were to be implemented, then such discrimination must be proportionate to the position that the person seeks to be employed in, and such discrimination must also be done on the basis that the person's prior corrupt conduct is incompatible with the inherent requirements of that position in the public service. The Northern Territory has an advantage over the approach in New South Wales. This is because New South Wales has a general corruption offence which makes it harder for an employer to discriminate based on that ground, as the employer would need to investigate whether the corruption was between private persons, or if it involved public administration. On the other hand, the Northern Territory has specific offences for official corruption under Pt IV and non-official corruption under Pt VII of the *Criminal Code*. This fact alone would make it easier to determine if a person's criminal record is incompatible with the inherent requirements of the job they are applying for in the public service, as there is no need to inquire as to the circumstances of the conviction – such a conviction by its very nature directly relates to public administration and involves improper conduct worthy of criminal sanction.

Although the Northern Territory ICAC is still in its infancy, there are still actions that can be undertaken before seeing its results. Whereas the ICAC can identify corruption and recommend changes, institutional barriers may be raised by the Legislative Assembly and the policies and procedures of other public bodies to ensure that, once corruption has been identified and removed by the ICAC, it has a lower likelihood of reoccurring.