An Anti-corruption Body for the ACT

Introduction

This paper addresses three issues that are important for an effective, publicly acceptable, anti-corruption body for the ACT. Many features of such an organisation are readily understood and unarguable. But there might be some debate over these issues: the definition of corruption, the persons that fall within the reach of an anti-corruption Act and the need for public hearings.

The Definition of Corruption

It is arguable that there has been a decline in the health of the social contract that ought to exist between the governed and the governors. In modern times, the model for a democratic government can be represented by a contract between those two parties. Voters delegate to the government wide and extensive powers on the basis that the government will use those powers only for the public good and only in a reasonable manner.

By public good, we mean that decisions are not made to enhance the wealth of government officials (or, for that matter, merely to improve the re-election of the government). Under this view, pork barrelling and parish pumping are as corrosive of the trust that should exist between the two parties as theft or fraud. (If this were not accepted, then Barnaby Joyce's decentralisation actions in the federal sphere would be judged to be entirely proper and legitimate.)

The phrase 'reasonable manner' connotes honest communication – without dissembling and without withholding of information - and the use of processes designed to enhance public good.

It is thus important for the health of the social contract that any act that is done that is knowingly adverse to that contract should fall within the term 'corrupt activity'. (This definition would thus exclude acts that are done with negligence or from ignorance, even should those acts diminish public good.)

The definition of corruption contained in the NSW Independent Commission of Corruption Act 1988 appears to accord with the above definition. In particular, that Act defines partiality as being a corrupt act. The meaning of the requirement that public officers act impartially or that they do not act partially is not defined in the Act. But the accepted meaning of the term means that public officers should not make decisions that are based on factors that are irrelevant to enhancing public good.

Scope of an Anti-corruption Act

The NSW ICAC legislation was thought to embrace those persons who benefited from acts that were known or ought to have been known as corrupt, even if they were not public officers. Similarly, the Act was thought to embrace acts of public officials that adversely affected the social contract even though those persons were not acting in any public capacity at the time. However, it seems that the ICAC Act was deficient in these matters.

The ACT government thus must ensure that where public officials adversely affect government activity they and their corrupt acts are covered by the anti-corruption legislation. (The legislation would not embrace officials who act illegally in non-government matters.)

And those persons who knowingly benefit from corrupt acts of public officials or who cause a public official to act unknowingly in a manner adverse to the public good must also be embraced by that legislation, whatever the status of those persons (that is public officers or not).

Public Hearings

We have seen from the NSW and other jurisdictions that some legislators are reluctant to allow anti-corruption bodies to undertake public hearings. Alternatively, they restrict the use of public hearings to a minimum. It is sometimes said that such hearings are equivalent to an inquisition (into the guiltless) or a kangaroo court or that these hearings unfairly taint those who are not corrupt. But this reluctance is unfounded.

Firstly, public hearings such as those conducted by the NSW ICAC nearly always follow private investigations that have provided the ICAC with adequate evidence to suggest the existence of corruption. In the case of the ICAC, there is a close correlation between public hearings and corruption findings. (In the last ten years, there have been an annual average of 7.2 investigation reports involving findings of corruption and public hearings have averaged 8.1per annum.

Secondly, it is not in the interests of anti-corruption bodies to conduct public hearings that do not result in corruption findings.

Thirdly, again using the ICAC as a model, there have been only a couple of cases where ICAC findings of corruption have been overturned by NSW courts and these appeals can be seen to have succeeded on technical grounds.

Fourthly, in Australian jurisdictions, serious indictable offences must first be considered by public committal hearings before a magistrate. Those who argue that there should be no public hearings by anti-corruption bodies need to consider this precedent. Indeed, if the arguments against public hearings prevail, it suggests there should be no open court hearings.

Fifthly mandated private processes offend the principle that justice must be accorded by public processes. Private hearings give the public no confidence that justice has been accorded properly, professionally, impartially and diligently.

Lastly, it is true that more public attention is given to public hearings involving Ministers of the Crown, parliamentarians and legislators and senior, appointed public officials. Even though public hearings about these officers are in the minority, close media attention to those hearings is entirely understandable: it is those public officers who can and do most damage to the social contract.

Conclusion

The Committee should take as its objective the need to establish an anti-corruption body that best protects the social contract between voters and government.

There are a number of issues that affect the effectiveness of such a body, including how such a body is funded and led. But the above three issues also have a large bearing on achieving that objective.

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