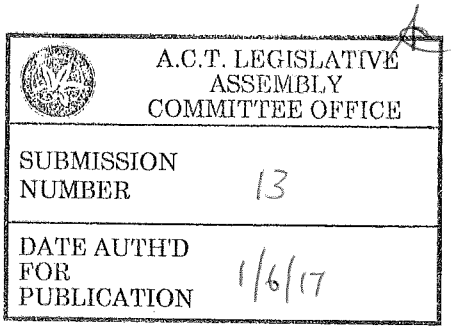
SUBMISSION TO THE SELECT COMMITTEE ON AN INTEGRITY COMMISSION FOR THE ACT

By: Dr Benedict Sheehy
Assoc. Professor of Law,



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Dear Chair of the Select Committee:

Introduction

In designing an integrity body, commission, agency or otherwise (referred to in this submission as "body"), the ACT Legislative Assembly has established a Select Committee to gather information. This approach has included a call for input to which this submission answers.

There is a temptation in political matters and matters that appear to be "common sense" to canvass a range of popular ideas or simply copy practices from elsewhere on the assumption that such ideas and practices will solve local problems. Further, when procedural difficulty arises in advancing preferred solutions, the institutional premise in politics is to solve an impasse by making compromise making trade-offs on the basis of preference rather than principle. This approach of common sense, political compromise and cobbled together parts is more likely to produce an incoherent, compromised body than a well-designed, well-functioning integrity body. It runs the risk of wasted efforts and funds, misconceived legislation, a failed regulatory function and ultimately further distrust, disillusionment and disengagement of voters.

An alternative method is to return to first principles and develop a fit for purpose solution. This method begins with a clear understanding of the nature and scope of the problem to be addressed, an examination of existing institutional arrangements, examination of local and international best practices in integrity and then, proceed to develop a body following best practices of regulatory design (Feaver and Sheehy 2015, Sheehy and Feaver 2015). Accordingly, in designing a body to address the vital issue of integrity in government, the ACT would do well to avoid traditional practices and consider carefully the opportunity the current situation presents, namely, the option of designing a fit for purpose body starting from first principles.

This submission makes the case for proper design with reference to the Committee's terms of reference.

Core Issue: Does the ACT need an Integrity Commission?

The development of an integrity commission is a critical step in the maturation of the ACT and its governance institutions. Neither the size nor the age of the ACT preclude the need for an integrity body. Indeed, in some ways the ACT's special history, governance peculiarities and size call for greater attention to the potential problem. As a newer, smaller territory, with close networks is a context in which relationships are fresher, more integrated and as such more prone to use in ways

that do not support the public interest. That issue has been recognised through, for example, the *Public Sector Management Amendment Act 2016* (ACT), but a commission to ensure integrity is the norm remains of significant importance.

In addition, in terms of its governance, the ACT has peculiarities which further recommend attention to this important function. The Territory operates as both local and quasi-state government and with a unicameral legislative body, the ACT government has greater powers with less or perceived les accountability. These powers lead to a reasonable proposal of ensuring the corollary of a special accountability body. Further, as public administration scholars Prenzler and Faulkner note: "Given the numerous cases of public sector misconduct and corruption exposed by integrity commissions it is becoming increasingly difficult to argue against their role as essential institutions" (Prenzler and Faulkner 2010).

Although the ACT has suffered no major corruption scandal, the historical lack of a major scandal may be an indication of good, clean practice or a consequence of the absence of an integrity body in the past. The popular aphorism captures the idea with the statement: "absence of evidence is not the same as evidence of absence". The ACT should take a positive steps toward ensuring the continuation of its record and toward best practice. In light of the above, an integrity body is well justified.

Utility and cautions associated with adapting other models

In developing an integrity body, there is good reason to look at models elsewhere. Both failures and successes contain lessons that may be applicable to the ACT; however, great caution needs to be exercised when looking at those models and their lessons. As an area of research, comparative law experts suggest that legal institutions of all types tend to struggle where they are imported without due attention to context. The context likely contains many unique specific success factors as well as risks (Sheehy and Maogoto 2008) (Sheehy 2013). Extracting appropriate parts of models and lessons of both success and failure will require discerning among those models and lessons to identify which aspects are attributable to specific agency or body design and those which are more attributable to the institutional context. Accordingly, when designing a body such as the ACT is proposing, special attention needs to be given to the specific context in which that body is expected to operate. It needs not only to effectively imitate and adapt other models, but as noted in the Issues Paper to go beyond in order to ensure that the proposed body works well with existing bodies and practices that are working and disrupt those which are less than optimal (Commission 2017).

Consider, for example, some of the local and international comparator agencies. The NSW ICAC has been embroiled in a number of affairs. One such controversy was over allegations of partisan investigations in the Obeid affair. This controversy arose from statutory objects, structure, powers and procedures in place at the time, as well as Obeid's position as a Labor politician combined with opportunism at the time of the hearings by the reigning Liberals. A similar situation eventuated in the investigations around lobbying in the O'Farrell and Baird governments, which combined with the issues surrounding the Cunneen affair, led ultimately to the resignation of Commissioner Latham and regulatory reform. The nature and extent of the lessons from NSW's ICAC depend not only on the political incumbency of parties under investigation but also on the objects, structure, powers

and procedure of ICAC. Further, when looking to NSW, particular attention to and classification of the specific aspects of the NSW model which are of interest to the ACT need to be identified and evaluated contextually prior to adoption.

Another example can be drawn from Hong Kong. Hong Kong initially had positioned anti-corruption functions within its police force. The case of the notoriously corrupt Chief Superintendent of the Royal Hong Kong Police, Peter Godber, however, caused the government to adopt a Singaporean style anti-corruption body which, while successful, used heavy-handed techniques that would be unacceptable today. ACT, in its current AFP contracting includes some anti-corruption functions. The ACT will need to engage in thoughtful design to get the most out of its on-going relationship with the AFP while minimising risks. Again, the Hong Kong case exemplifies the lesson that procedures and structures in other jurisdictions require careful consideration before looking to them for instruction on an ACT body.

As another local example, reference can be made to Victoria's anti-corruption body, IBAC. That body has been referred to correctly as a "toothless tiger" by Victoria's leading newspaper, The Age. It has very significant procedural hurdles to surmount prior to being able to engage in its anti-corruption tasks. IBAC requires knowledge of corruption tantamount to that which is necessary to commence criminal prosecution prior to investigating. In other words, its role is practically complementary or even supplementary to the police, rather than the role of watchdog with independent investigatory powers.

Accordingly, in designing the ACT's integrity commission, while drawing from other bodies, whether NSW's controversial ICAC, Hong Kong's successful ICAC, Victoria's weaker IBAC or some other body, particular attention will need to be granted to both the context of the model and its lessons and those applicable to the ACT's specific context. A clear identification of the specific contextual factors which led to success and a clear understanding of which factors can be readily transferred to the ACT must be made.

In sum, models in other jurisdictions not only have contextual factors leading to success or failure but also design features. Identifying and understanding both contextual factors and design features as well as understanding how those design features work is critical to good design. That is, identifying the parts, powers and relationships of the integrity body in addition to critical contextual factors is a basic task to be undertaken before adopting and adapting.

It is suggested that research be commissioned to identify the appropriate comparators and determine their potential and limitations as models and as providing lessons for the ACT.

Issues of Design: Considerations with respect to scope, structure, governance, powers and procedures

A conceptual problem prior to addressing operational scope is simply the definition of corruption. While a global literature on corruption is available, a definition that works both in practice and at law needs to be developed for the ACT. In other words, defining corruption for ACT purposes is the first step in establishing scope. Next, operational scope needs consideration. The question in the ACT is "What is the appropriate scope, given the ACT's size, resources and history?" Scope can refer to

any of: areas of scrutiny, methods of ensuring accountability—from simple reporting to covert investigation, to the parties to be subject to scrutiny, and the time frame, from distant past through to future.

Each of the bodies just identified (NSW, HK and VIC) has a distinct scope of responsibility, legal and operational structure, governance arrangements, legal powers and procedures. Each of these needs distinct consideration (powers are dealt with separately as per the Call for Submissions). For example, the scope of the NSW's ICAC is very broad in terms of both seriousness of the allegation and parties which may be investigated—from politicians and public servants to private sector actors.

Perhaps a starting point is a consideration of the specific risks posed by the ACT's unique governance position and structure. For example, planning, which is usually done by local government and subject to scrutiny by state governments, in the ACT is subject to less scrutiny. Accordingly, there may be a particular aspect of the scope focused on planning.

In addition to scope in terms of areas, as noted, there is the matter of time. Being a new body an ACT integrity body would operate only after the legislation is enacted; however, there may be legacy issues which need to be addressed. The historical lack of a major scandal, as noted, may indicate any one or more of a variety practices including the absence of an integrity body. While the Assembly must set the scope to address the matter of past practice, it is important that they get it right. Reputations are built over decades but easily damaged in a very short time period. By the same token, failure to include a time scope that allows the body to address previous issues leaves the body open to accusations of blocking prosecution of past corruption. A range of possibilities exist as to how the past can be addressed without breaching the fundamental rule of law principle which bars retrospective prosecution. Such possibilities could include voluntary private disclosures, public hearings and simple documentary disclosure of existing public documents.

Similar issues and questions as those just mentioned in reference to scope need to be raised for each of: structure, governance, powers and procedures. Consider the matter of structure. Effective and appropriate design in the ACT needs to include consideration of ACLEI, PSSC, Assembly Standards Commissioner and other bodies. Again, given the ACT's small size and related limited resources, including an independent oversight organ might be both unnecessary and too costly. The alternative of following a model local practice (Prenzler and Faulkner 2010) of a Cross-Party Parliamentary Oversight Committee might fail to provide the depth of oversight required and simply accept an annual report.

Again, considering the matter of appropriate governance requires investigation. Special account of the situation in the ACT—its history, resources, statutory objectives/scope is required. Further, consultation with government and existing accountability and transparency mechanisms and bodies in the ACT will be required to determine what is working, why and then to ensure there is no unnecessary reduplication and facilitated on-going collaboration and avoid setting them up to compete.

An important element of governance is derived from structure. The internal organisational structure of the proposed commission must distinguish clearly between management and operational functions and ensure that executive control is properly configured to ensure the integrity of both

management and operations (Sheehy and Feaver 2016). Further, in structuring governance as well as developing appropriate procedures, the integrity body must have its own oversight arrangements. These oversight tasks must be structured with an appropriate procedure such that accusations like those levelled against NSW's ICAC as a "Star Chamber" are avoided. At the same time, there must also be appropriate powers to provide assurance to both public and public servant that probity is secure and the conduct of investigations are fair. The proper determination of the governance structure and procedures are a matter that can only be determined within the context of the ACT, again because of the ACT's unique history and governance characteristics.

A second but related issue is the structure of the integrity commission itself. Whether the legal structure of the organisation ought to be a commission or some other type of body is a matter for research and consideration. Again, the considerations are both political and matters of best practice and as such not susceptible to wholesale copying from other jurisdictions. Deciding on the legal structure must take into account the legal objectives as well as political context—both positively and negatively—in order to achieve the desired integrity outcomes (Feaver and Sheehy 2015).

Clearly, there is information that needs to be collected and mapped, before appropriate models can be developed, presented and considered.

Accordingly, it is recommended that research be commissioned to identify in consultation with government and in light of best practice, the appropriate scope, structure, governance, powers and procedures for an integrity body.

On Powers and Resourcing

The Committee has correctly identified the need for consideration of powers. A review of the international literature indicates that a very wide range of options are open to the committee when considering how law may address integrity issues (Ackerman 2011). A critical issue will be identifying appropriate powers and ensuring that those are tightly connected to scope and statutory objectives. Loosely connected to a broad or vague scope, powers can lead the body into fruitless and even counterproductive work. By setting the scope wisely and clearly, the required powers will be more easily identified and balanced by accountability obligations. By clearly connecting power with accountability, some of the more egregious errors of government bodies, including integrity bodies, may well be avoided (Sheehy and Feaver 2016).

Along with appropriate powers, no legal body is successful without appropriate resourcing. The ACT as a small territory has limited resources. It will be necessary in the design process to think creatively about how additional resources can be obtained and existing resources leveraged to ensure adequate resources without unnecessarily burdening the budget. As noted in other contexts, denial of adequate resources is mechanism for political control of agencies and can seriously undermine the efficacy of agencies including integrity bodies (Sheehy and Feaver 2016). It can also fundamentally erode the perceived legitimacy and thereby improperly politicise those bodies.

Yet limited resources can also spur the development of an appropriately focused body which balance integrity assurance with the effective and efficient execution of government business (Anechiarico and Jacobs 1996). A properly empowered and resourced body will allow government

the most efficient and effective use of funding, and where resourcing is coordinated with other parts of government and aspects of the budget, both government and citizens can be assured that the body is properly engaged in its governance role.

Conclusion

Following common Australian practice, the Committee may well recommend some type of executive body (Prenzler and Faulkner 2010). While this could well be an appropriate generic solution, it will be necessary to address the specific context of the ACT in its design and corresponding regulatory framework.

The success of the proposed integrity body depends on a number of factors, but the ultimate measure of success will be the extent to which it is able to fulfil its statutory objectives. These objectives may include education, prevention, investigation and prosecution, and something not emphasised in the Australian models although more common overseas—recommendations for regulatory reform. Regardless of the objectives ultimately determined, these objectives need to be clearly specified, coherently set out and the integrity body must have the appropriate suite of powers to accomplish its objectives. Coherence in regulatory bodies is a necessary precursor to success of those bodies (Feaver and Sheehy 2015, Sheehy and Feaver 2015).

Particularly as a governance body, the ACT's integrity agency's own governance, structure and powers must take account of its clearly bi-directional operational and accountability focus—general public and government. It must be publicly responsive, publicly accountable, engage at some level in investigation, reporting, education and be answerable at law. While the foregoing is far from a comprehensive review of what needs to be done and considered it is hoped that it is a useful contribution to the process of designing that body for which the ACT government has struck the Select Committee. It is hoped that the Committee provides government with the option and advice of researching for a well-designed body that leaves a legacy of pride and confidence for both the government and the people of the ACT.

I would be pleased to appear before the Committee to provide further information or add clarity to this submission.

Yours truly,

Benedict Sheehy, PhD

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