



Ethics and Integrity Adviser

Mr Shane Rattenbury MLA
Chair
Select Committee on an Independent Integrity Commission
Legislative Assembly for the Australian Capital Territory

	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
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Dear Mr Rattenbury

In light of media coverage of my remarks and those of others appearing before the Select Committee on Thursday 20 July 2017, I thought it would be appropriate to provide the Committee with a supplementary submission to make clearer my views on the conduct of investigations by an ACT Integrity Commission, should such be established.

In my view:

- There should be a clearly expressed presumption that complaints made to the Commission would be referred by it to the existing agency with jurisdiction to investigate and resolve those complaints. While the Commission may have a role in monitoring progress in the conduct of those investigations and resolution of underlying complaints by those other agencies, it would itself investigate and resolve complaints only as proposed below.
- The Commission would be empowered to conduct an investigation into a complaint about integrity in government administration only in the following circumstances:
 - Where there was no existing agency with jurisdiction to deal with the matter;
 - Where an existing agency refused to deal with a complaint referred to it by the Commission; or
 - Where an otherwise appropriate agency was unable to deal with the complaint without an actual or reasonably perceived conflict of interest.
- Consistently with the usual presumption of innocence until proven otherwise, Commission investigations would be required to be conducted in private in order to protect the reputation of persons who might be found after due investigation to have been wrongly accused and to avoid any deterrent to others with relevant information who might otherwise not be prepared to provide that information in a public forum. This is no different to the usual procedures for the conduct of investigations by police and other relevant agencies.
- If, following an investigation, the Commission considered that there had been a criminal offence committed, it would be required to pass the matter to the Director of Public

Prosecutions and would not be empowered to initiate or conduct a prosecution itself. The Director would exercise his or her prosecutorial functions in the usual way, taking decisions as to whether or not there was sufficient admissible evidence to sustain the conclusion of criminality reached by the Commission and whether there were reasonable prospects of a conviction. Where undertaken, prosecution would be conducted in the ordinary manner before the courts and any restriction on the prosecution being openly reported would be a matter for the court.

- To guard against the possibility, however remote, that the Commission's conclusion was that the Director of Public Prosecutions was the party who should be prosecuted, the legislation should provide for a fall-back arrangement for the conduct of the prosecution – this might be by engaging a Director of Public Prosecutions from another jurisdiction to conduct the prosecution, rather than empowering the Commission to do so itself.
- If, following an investigation, the Commission considered that there had not been a criminal offence committed but that the conduct in question warranted the imposition of a civil sanction under the existing law (e.g., termination of employment or action for the recovery of debt), the Commission should be required to refer the matter to the existing agency with power to take that action with a recommendation that it be taken. If the agency declined to take the recommended action and the Commission remained of the view that it should be taken, the Commission would be entitled to raise its concerns with the Minister responsible for that agency and, if it still remained concerned about a lack of action after Ministerial consideration, with the Assembly Committee responsible for oversight of the Commission. Where a civil sanction was imposed, the ordinary rules governing publication or confidentiality applicable to that class of sanction would apply.
 - The legislation should however provide a fall-back arrangement where for some reason the agency with power to impose the civil sanction would have an actual or reasonably apprehended conflict of interest if it were to do so. In this limited circumstance, it might be appropriate for the Commission to be empowered to exercise the powers of the affected agency.
- Consideration should be given to whether or not the legislation establishing the Commission should provide for a new civil sanction under which the Commission could, after the conduct of its investigation in private, publicly release a finding of "corruption". In undertaking this consideration, it would be necessary to contemplate whether "corruption" could be defined so as to avoid that definition covering conduct that could constitute an existing criminal offence - where such conduct has been found, the preferable course is that the matter be dealt with by way of criminal prosecution with all the systemic and personal safeguards that attach to that process.
 - The legislation should deal with the situation where evidence obtained by the Commission was otherwise sufficient to establish the commission of a criminal offence but would be inadmissible in criminal proceedings because it had been obtained under the Commission's coercive powers. In such a situation, it may be appropriate for the legislation to permit the Commission to issue a "corruption" finding but only where the Director of Public Prosecutions agreed that, if the evidence had been admissible, it would have been of sufficient probative value to make it likely that a conviction would have been secured.

- If, after an investigation, the Commission was of the opinion that:
 - there was insufficient evidence to establish the commission of a criminal offence;
 - there was no applicable civil sanction that could be imposed; and
 - the circumstances did not permit the issuance of a "corruption" finding (assuming the legislation permits this)

but that the conduct in question was nevertheless blameworthy and should have attracted some adverse consequence for the person undertaking it, the Commission should be empowered to initiate a public systemic inquiry into the question of whether or not the law should be amended to provide some form of sanction (whether criminal or civil) for conduct of that nature. In such an inquiry, the facts found about the person involved in the course of the Commission's investigation and their identity would not be able to be disclosed, in recognition of the fact that the person in question had not infringed the law as it stood at the time of their conduct.

I hope the above will be of some assistance to the Committee. Please do not hesitate to contact me if any

Yours sincerely

Stephen S

24/7/17