



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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SELECT COMMITTEE ON AN INDEPENDENT  
INTEGRITY COMMISSION 2018

Mr Shane Rattenbury MLA (Chair), Ms Elizabeth Lee MLA (Deputy Chair)  
Ms Bec Cody MLA, Mrs Vicki Dunne MLA, Mr Chris Steel MLA

## Submission Cover Sheet

### Inquiry into an Independent Integrity Commission 2018

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OFFICE OF THE LEGISLATIVE ASSEMBLY

Shane Rattenbury MLA  
Chair  
Select Committee on and Independent Integrity Commission 2018  
Legislative Assembly for the Australian Capital Territory  
London Circuit, Canberra ACT 2601

**Submission—Office of the Legislative Assembly**

Dear Mr Rattenbury,

In response to your letter of 31 July, please see attached submission on behalf of the Office of the Legislative Assembly.

Yours sincerely,

Tom Duncan  
Clerk of the Legislative Assembly

August 2018



# OFFICE OF THE LEGISLATIVE ASSEMBLY

SUBMISSION TO THE SELECT COMMITTEE ON AN INDEPENDENT INTEGRITY COMMISSION 2018

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## 1. SCOPE

- 1.1. This submission aims to inform the committee's consideration of the legislative, procedural and administrative arrangements that might best apply in relation to the establishment of an independent integrity commission of one kind or another.
- 1.2. There is a particular emphasis as to how matters of parliamentary privilege might be addressed in such arrangements.
- 1.3. The submission also seeks to highlight a number of issues for the committee to consider in relation to the two legislative proposals that have been referred to it.

## 2. SUMMARY

- 2.1. The Office makes the following submissions.

1. The Office submits that legislation establishing a commission should not have the effect of altering or affecting the Assembly's privileges as codified in the *Parliamentary Privileges Act 1988* (Cth) or as understood more broadly under law..... 10
2. The Office submits that: a) statutory provision be made to the effect that where a matter of parliamentary privilege arises in the course of the exercise of a commission's powers, it shall be dealt with by the Assembly; and b) there is no declaration in statute or legislative instrument of the Assembly's privileges or of particular procedures that are to apply in relation to parliamentary privilege. .... 11
3. The Office submits that the committee consider the merits of establishing an independent arbitration process to determine parliamentary privilege claims that arise during the exercise of an integrity commission's powers through an independent, arms-length, apolitical process with the following features:
  - a) the authority for the process would be established by way of continuing resolution or standing orders;
  - b) the arbiter would be appointed by the Speaker following consultation with the Standing Committee on Administration and Procedure;
  - c) there would be a requirement that the arbiter is an eminent legal professional of high standing such as a former Judge, Justice or possibly a Queen's or Senior Counsel;
  - d) provision would be made for the arbiter to consult with, and be advised by, persons with relevant technological, parliamentary or other expertise;
  - e) where a large volume of documents is to be evaluated, the arbiter would be permitted to be assisted by suitably qualified persons operating under the direction of the arbiter;
  - f) in evaluating relevant information, documents or things and making a determination, the arbiter would have regard to the Parliamentary Privileges Act, case law relating to the interpretation of the Parliamentary Privileges Act, relevant reports of both the Assembly's and the Commonwealth Parliament's privileges committees, and the test outlined at paragraph 3.37 of this submission;
  - g) the arbiter would report to the Assembly and the commission with a decision which would be binding and final;
  - h) detailed procedures associated with the handling of documents or things and other

operational requirements may be developed by MOU or some other agreement between the Speaker, on behalf of the Assembly, and the commission..... 18

4. The Office submits that where the committee and the Assembly favour the establishment of an independent arbitration process, the Standing Committee on Administration and Procedure further consider: a) the scope and content of changes to the standing orders or continuing resolutions required to effect independent arbitration arrangements; b) the scope, content and mode of any associated MOU, agreement or procedures; and c) relevant legal issues. .... 19

5. The Office submits that the legislation and associated arrangements for the establishment of an integrity commission should not displace the roles of the Legislative Assembly Commissioner for Standards or the Ethics and Integrity Adviser. .... 19

6. In the event that an integrity commissioner is to be an Officer of the Assembly, the Office submits that committee consider the inclusion of a provision in any bill establishing an integrity commission that the Speaker may seek administrative support or advice in the exercise of the Speaker’s statutory functions..... 20

7. The Office submits that the committee consider the most appropriate oversight committee for an integrity commission and whether the resolution of appointment for an existing standing committee be amended or a new standing committee is established. .... 20

8. The Office submits that the committee consider whether statutory provision be made in order that: a) a commission is required to establish a register of conflicts of interest that have been declared and that the register include steps that have been taken to effectively manage any conflicts to the satisfaction of a commissioner; b) the register is made available to an inspector; c) an inspector must report to the relevant Assembly committee on the extent to which conflicts of interest are being effectively managed by a commission. .... 21

9. The Office submits that the committee consider the merits of including statutory provision for the establishment of selection criteria and an appointment process for the positions of commissioner and inspector along the lines of s 4AA of the *Supreme Court Act 1933*. .... 23

10. The Office submits that the committee consider the appropriate length of the term of appointment of a commissioner and CEO of a commission in order to facilitate the effective continuity of the commission’s operations..... 23

11. The Office submits that the committee consider bankruptcy and insolvency as grounds for suspension of a commissioner or inspector..... 24

12. The Office submits that the committee consider inclusion of a provision or provisions in legislation rendering a person ineligible for appointment as commissioner, inspector, CEO of a commission, or staff of a commission where a person has been convicted of an offence punishable by imprisonment for at least 1 year. .... 24

13. The Office submits that the committee consider the propriety or otherwise of conferring on a commission the statutory function of providing ‘leadership and coordination’ in respect of the Assembly’s integrity frameworks. ....	25
14. The Office submits that the committee consider the propriety or otherwise of conferring on a commission the statutory function of providing ‘leadership’ to the legislative branch of government. ....	25
15. The Office submits that the committee consider the merits of making provision for the development of liaison and referral arrangements between a commission and the Legislative Assembly Commissioner for Standards and the most suitable form for such arrangements.	25
16. The Office submits that the committee consider whether explicit legislative provision ought to be made in relation to the suspension of the CEO of a commission. ....	26
17. The Office submits that provision be made in legislation to permit an integrity commission to refer matters to the Legislative Assembly Commissioner for Standards, Speaker or Deputy Speaker where those matters fall within the respective jurisdiction of the Commissioner for Standards, the Speaker or the Deputy Speaker (notwithstanding that a commission itself might not have an investigative jurisdiction in a particular matter). ....	27
18. The Office submits that the Standing Committee on Administration and Procedure consider possible amendments to continuing resolution 5AA so as to require that where the Legislative Assembly Commissioner for Standards, in exercising his or her jurisdiction, reasonably suspects that conduct falling within the statutory definition of corrupt conduct has occurred, he or she must report the suspected conduct to an integrity commission.....	27
19. The Office submits that a commission not be empowered to give a direction to the Legislative Assembly Commissioner for Standards in relation to the exercise of the Commissioner for Standards’ functions under continuing resolution 5AA. ....	27
20. The Office submits that where legislation empowers a commission to make directions in relation to an entity to which a corruption report has been referred, the Speaker, Deputy Speaker and Legislative Assembly Commissioner for Standards ought not to be subject to such a direction. ....	27
21. The Office submits that the Code of Conduct for all MLAs, made pursuant to Assembly resolution, ought not to be referenced in any statutory definition of corrupt conduct. ....	28
22. The Office submits that the committee consider the merits of statutory provision establishing a duty for all MLAs and all staff and contractors employed by MLAs to notify a commission where they reasonably suspect corrupt conduct on the part of an MLA, staff or contractors employed by MLAs. ....	28
23. The Office submits that the committee consider the role that the commission might have in referring claims relating to parliamentary privilege to the Supreme Court. ....	29
24. The Office submits the Clerk not be given a role, pursuant to statutory requirement, to represent a claimant in relation to a claim of parliamentary privilege. ....	29

25. The Office submits that the Speaker, rather than the Clerk, ought to be notified in the event that a search warrant is to be executed in relation to an MLA or the Assembly or where parliamentary privilege is potentially engaged. .... 29

26. The Office submits that the committee consider whether legislative provision be made in order that a confidential report may be given to the relevant Assembly committee by a commission, rather than to the presiding officer of the relevant Assembly committee. .... 29

27. The Office submits that the committee consider whether legislative provision be made so that where a committee receives a confidential report from a commission, the committee must notify the Assembly that it has received such a report. .... 29

28. The Office submits that the committee consider legislative provision in relation to declarations of interests on the part of a commissioner, inspector and CEO of a commission in order that: a) the relevant Assembly committee is given access to all declarations made by an inspector; b) an inspector is given access to all declarations made by a commissioner and CEO (irrespective of whether the Speaker considers that certain information ought not to be made publicly available via a website)..... 30

29. The Office submits that the committee consider: a) establishing the register of lobbying by way of legislative instrument made pursuant to statutory provision in legislation establishing a commission; b) vesting in a commissioner or delegate of the commissioner the registrar function; and c) repealing relevant continuing resolutions of the Assembly..... 31

30. The Office submits that the PID Act should be amended as soon as practicable in order that the Clerk no longer has a responsibility for investigating or addressing PID matters in relation MLAs or their staff and consideration be given to whether an integrity commission is a more suitable body for this function..... 32

31. The Office submits that the committee consider the merits of legislative provision to enable the Speaker to appoint a person to investigate an inspector where there are reasonable grounds to suspect misconduct. .... 32

### 3. PARLIAMENTARY PRIVILEGE

#### Background

- 3.1. Parliamentary privilege means the powers and immunities that inhere in the legislature to protect the integrity of its functions. The Assembly has the same privileges as the House of Representatives by virtue of s 24 of the ACT Self-Government Act.
- 3.2. The Assembly's privileges include:
- immunity from the impeachment or questioning of 'proceedings in Parliament' by a court or tribunal (freedom of speech immunity—see paragraph 3.4 below);
  - the power of inquiry and report (including the power to call witness and order the production of documents);
  - the power to make rules regulating the internal affairs of the Assembly;
  - the power to control the Assembly precincts; and
  - a limited immunity from arrest in a civil cause or attendance before a court or tribunal by an MLA (or certain parliamentary officers) in certain circumstances.
- 3.3. By virtue of article 9 of the Bill of Rights 1688 and statutory provision in the *Parliamentary Privileges Act 1987* (Cth), it is unlawful to impeach or question 'proceedings in Parliament' in any court or place out of parliament. Section 16(3) of the *Parliamentary Privileges Act* states that 'In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning the proceedings in Parliament, by way of, or for the purposes of:
- questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
  - otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
  - drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament'.
- 3.4. The term 'proceedings in Parliament' is cast in broad terms. Section 16(2) of the Act states that '**proceedings in Parliament** means all words spoken and acts done in the course of, or for purposes incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing includes:
- a) the giving of evidence before a House or a committee, and evidence so given;
  - b) the presentation or submission of a document to a House or a committee;
  - c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
  - d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published'.

- 3.5. Notwithstanding the broad scope of ‘proceedings in Parliament’, not every activity by a member of a legislature will fall within its ambit.<sup>1</sup> In *O’Chee v Rowley*, Fitzgerald P said ‘While the phrase “... for purposes of or incidental to, the transacting of the business of a House ...” in sub-s. 16(2) of the Parliamentary Privileges Act is to be given a generous operation, they do not transform every action of a parliamentarian in the pursuit of his or her vocation into “proceedings in Parliament”.’<sup>2</sup> In a similar vein, Burns J, in *Slipper v Magistrates Court of the ACT*, said:

Parliamentarians undoubtedly engage in many activities that have no real connection with “the transacting of the business of a House or of a committee”. It is, of course, not beyond human ingenuity to devise connections between any activity engaged in by a parliamentarian and the core activity protected by Article 9 and s 16, the freedom of speech within Parliament. The text of s 16, however, does not support the proposition that it encompasses all acts done by a parliamentarian, even in the course of their occupation. What engages the provisions of s 16 are words spoken or acts done for particular purposes, being the transacting of the business of a House.<sup>3</sup>

### Altering the privileges of the Assembly

- 3.6. The Office notes that clause 7 of the Government’s exposure draft bill seeks to affirm the powers, immunities and privileges of the Assembly, stating that ‘This Act does not affect the law relating to the privileges of—(a) the Legislative Assembly...’. Clause 47 of the private member’s bill provides that ‘The commission must not exercise a compulsion power in a way that is inconsistent with the powers, privileges and immunities of the Assembly’.
- 3.7. While it is generally accepted that parliamentary privilege will prevail to the extent that a given statutory provision is inconsistent (except where express statutory provision limiting its application has been made),<sup>4</sup> no derogation of the privileges of the Assembly should arise from legislation establishing a commission. Clear language to this effect has been included in laws enacted by other Australian parliaments that have established integrity or anti-corruption commissions of one variety or another. See, for example, s 122(1) of the *Independent Commission Against Corruption Act 1988* (NSW) and s 3(2) of the *Corruption, Crime and Misconduct Act 2003* (WA).

**1. The Office submits that legislation establishing a commission should not have the effect of altering or affecting the Assembly’s privileges as codified in the *Parliamentary Privileges Act 1988* (Cth) or as understood more broadly under law.**

### Memorandum of understanding

- 3.8. The Office notes that both legislative proposals before the committee include provision for the development of a memorandum of understanding (MOU) between the Speaker and a commission in relation to parliamentary privilege, by way of legislative instrument. Clause 176(1) of the Government’s exposure draft bill states that ‘The commission and the Speaker, on behalf of the Legislative Assembly, must enter into a memorandum of understanding about parliamentary

<sup>1</sup> While Members of the Legislative Assembly are entitled to make claims in relation to parliamentary privilege—for instance, claiming immunity from a particular legal process—it is the Assembly as a whole that possesses parliamentary powers and immunities, rather than any particular member.

<sup>2</sup> *O’Chee v Rowley* [1997] 150 ALR 199 at 27

<sup>3</sup> *Slipper v Magistrates Court of the ACT* [2014] ACTSC 85 at 49

<sup>4</sup> ‘Odgers’ Senate Practice’, 14th edition, p 69.

privilege ...'. Clause 176(3) provides that 'The commission and staff of the commission must act in accordance with the parliamentary privilege memorandum in relation to any matter that may be the subject of parliamentary privilege'. Clause 150 of the private member's bill provides that 'The commission and the Speaker may enter into a memorandum of understanding about the procedures to be followed by the commission in exercising its powers under this Act in relation to the Legislative Assembly'.

- 3.9. The Office agrees that an MOU is a useful means by which to spell out detailed procedural requirements in relation to the exercise of a commission's powers vis-à-vis the Assembly, its committees and its members.
- 3.10. However, the Office considers that no statutory provision for the development of such an MOU ought to be made.
- 3.11. Instead, the Office favours a simple statutory provision to the effect that where matters of parliamentary privilege arise in the exercise of a commission's powers or functions, they will be dealt with by the Assembly. It would then be for the Assembly, through its standing orders and continuing resolutions, to make the necessary arrangements including, making provision that various procedures and agreements (or MOUs) may be developed.
- 3.12. This approach is preferred on the basis of the potential, where statutory provision or legislative instrument is used, for the Assembly to inadvertently declare some aspects of its powers, privileges and immunities pursuant to s 24(2)(a) of the Self Government Act in a way that could reduce those powers, privileges and immunities as declared in the Parliamentary Privileges Act and understood under general law.
- 3.13. By using the Assembly's own non-legislative powers to make rules and orders with respect to the exercise and upholding of its powers, privileges and immunities, the risk of inadvertent derogation is reduced. Such an approach also maintains the Assembly's jurisdiction to determine the manner and occasion of the exercise of its privileges and would result in arrangements that are non-justiciable.
- 3.14. These are matters that warrant consideration by the Standing Committee on Administration and Procedure.

**2. The Office submits that: a) statutory provision be made to the effect that where a matter of parliamentary privilege arises in the course of the exercise of a commission's powers, it shall be dealt with by the Assembly; and b) there is no declaration in statute or legislative instrument of the Assembly's privileges or of particular procedures that are to apply in relation to parliamentary privilege.**

### Limiting the Assembly's contempt power

- 3.15. The Office notes that clause 270(a)(iv) of the Government's exposure draft bill explicitly derogates from the Assembly's contempt power thereby 'affect[ing] the law relating to the privileges of ... the Assembly' (as per clause 7). The private member's bill also includes a similar provision at clause 21(1). The relevant clauses in both legislative proposals appear to have been derived from the existing language at s 35 of the *Public Interest Disclosure Act 1996*.
- 3.16. Whether the inclusion of such provisions interacts with s 24(2)(a) and s 24(3) of the

Self Government Act in such a way as to sever—either partially or completely—the Assembly’s enjoyment of the powers, privileges and immunities of the House of Representatives is a legal question which deserves additional consideration.

### **Determining claims relating to parliamentary privilege**

- 3.17. The Office notes that part 3.5 of the Government draft bill deals with the powers of entry, search and seizure and part 3.6 deals with examinations. Part 4 of the private member’s bill deals with investigative powers of a commission.
- 3.18. In establishing an integrity commission framework that gives due recognition to the privileges of the Assembly, there is a competing and legitimate public interest to ensure that erroneous or misconceived claims of privilege do not prevent a commission from performing its statutory functions. Careful consideration will need to be given as to how claims relating to parliamentary privilege might be made, assessed and determined in the context of the exercise of a commission’s powers.
- 3.19. While it is open to the Assembly not to make provision for a process to determine claims of privilege at the inauguration of an integrity commission, the alternative would be to wait until a particular claim of privilege emerged during the course of the exercise of a commission’s powers. However, such an approach would be vulnerable to criticism that the process had been coloured by adjacent political circumstances to be either favourable or unfavourable to a claimant. Establishing the process ahead of time, largely eliminates this problem.
- 3.20. There are a number of circumstances where the exercise of an integrity commission’s powers could potentially interact with parliamentary privilege, including where a commission seeks or purports to:
  - inspect, examine, or make a record of a document<sup>5</sup> or thing over which a claim of parliamentary privilege relating to proceedings in parliament has been made;
  - seize or otherwise take possession of a document or thing over which a claim of parliamentary privilege relating to proceedings in parliament has been made;
  - order the production of any document or thing over which a claim of parliamentary privilege relating to proceedings in parliament has been made;
  - exercise a coercive power to compel the answering of a question by a person under examination, which seeks to question or impeach proceedings in parliament;
  - make a finding in some matter using material that is a proceeding in parliament as the basis of the finding or making a report containing material that is a proceeding in parliament;
  - require the attendance of an MLA or certain parliamentary officers on, or five days before or after, a sitting of the Assembly (see s 14 of the Parliamentary Privileges Act); or
  - require the attendance of a member or certain parliamentary officers on, or five days before or

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<sup>5</sup> A document means a record of information, and includes—(a) anything on which there is writing; or (b) anything on which there are figures, marks, numbers, perforations, symbols or anything else having a meaning for people qualified to interpret them; or (c) anything from which images, sounds, messages or writings can be produced or reproduced, whether with or without the aid of anything else; or (d) a drawing, map, photograph or plan. See Dictionary, Part 1, *Legislation Act 2001*.

after, an Assembly committee meets (see s 14 of the Parliamentary Privileges Act).

- 3.21. While there is no explicit immunity held by members in relation to the exercise of a warrant, subpoena, or orders for discovery issued by courts or tribunals, Odgers' notes that there may be '... an effective immunity from such processes for compulsory production of documents where the documents are so closely connected with proceedings in Parliament that their compulsory disclosure would involve impermissible inquiry into those proceedings'.<sup>6</sup>
- 3.22. To be clear, such an 'effective immunity' is distinct from the foundational 'use immunity' that prohibits material, falling within the meaning of s 16(3) of the Parliamentary Privileges Act, from being used in a court or tribunal. Instead, it has been argued that there is growing acceptance that documents created for purposes of, or incidental to, proceedings in parliament may be immune not just from *use* by a court or tribunal to 'impeach or question' but from compulsory disclosure to a court in certain circumstances.<sup>7</sup> Similarly, the execution of a search warrant by an agency of the executive, such as a law enforcement or anti-corruption body, could be inhibited to the extent that the search or seizure of documents or items constituted an improper interference in the effective functioning of the parliament, its committees or its members. It could also amount to a contempt of parliament.
- 3.23. Where court proceedings are afoot and a question of parliamentary privilege arises in the context of those proceedings in such a way as to potentially affect the legal rights of those involved in litigation, the courts have tended to determine such questions.<sup>8</sup> Burns J, in *Slipper v Magistrates Court of the ACT*, said 'It is true that the actual exercise by the Parliament of an undoubted privilege may not be justiciable, but courts have a clear duty to 'judge of the existence in either House of Parliament of a privilege'<sup>9</sup> whenever doing so is relevant to a determination of the rights of the parties'.<sup>10</sup>
- 3.24. However, it has also been reasoned that where a claim of parliamentary privilege emerges in the context of a search warrant executed in aid of a 'lawful administrative investigation', it was not for the courts to determine the matter. French J, in *Crane v Gething*, said:

...whatever the full content of parliamentary privilege it does not derive from judge made rules nor does it depend for its application upon any exercise of judicial discretion. While the law of parliamentary privilege may properly be applied by the court in judicial proceedings where the privilege impacts upon the exercise of the court's jurisdiction and powers, it is not, in the ordinary course, for the courts to decide questions of privilege as between the Executive and the Parliament in litigation between the subject and the executive.<sup>11</sup>

- 3.25. One of Australia's leading authorities on parliamentary privilege, Enid Campbell, in commenting on

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<sup>6</sup> 'Odgers' Senate Practice' 14<sup>th</sup> edition, p 61.

<sup>7</sup> See *O'Chee v Rowley* [1997] QCA 401; [2000] 1 Qd R 207; 150 ALR 199; 142 FLR 1 and other cases cited at p 62 of Odgers'. Alternatively, there is case law recognising the court's role in receiving evidence to determine whether claims of parliamentary privilege are upheld—see *Crane v Gething* (2000) 97 FCR 9; *Egan v Willis* (1998) 195 CLR 424; *Hamsher v Swift* (1992) 33 FCR 545; *Amann Aviation v Commonwealth of Australia* (1988) 19 FCR 223.

<sup>8</sup> With some exceptions, for example, see *Crane v Gething* [2000] FCA 45, 50.

<sup>9</sup> See *Egan v Willis & Anor* (1998) 195 CLR 424 at 27

<sup>10</sup> *Slipper v Magistrates Court of the ACT* [2014] ACTSC 85, at

<sup>11</sup> *Crane v Gething* [2000] FCA 45, 50, at 49.

the decision in *Crane v Gething*, observed that:

French J's decision has not resolved questions about the extent to which statutory powers to grant search and seizure warrants, and authority conferred by such warrants, may be constrained by laws about parliamentary privileges. Answers to such questions must be found in the general law regarding powers of search and seizure. That general law inhibits the powers of law enforcement officers to engage in search and seizure exercises. It prohibits some such exercises except by warrant of a judge or magistrate, and it also places limits on what may be authorised or done in execution of such warrants.

Decisions of the High Court have established that the powers of search and seizure conferred by warrants granted under the *Crimes Act 1914* (Cth) do not extend to seizure of documents protected by professional legal privilege or the public interest immunity. These protections may be invoked in advance of the tender of the documents as evidence in court proceedings.

If statutory powers of search and seizure are so constrained, there must be a strong argument in support of the proposition that the same powers are equally constrained by laws about parliament privileges. Indeed, the public interest immunity could be construed as embracing claims made under the rubric of parliamentary privilege.<sup>12</sup>

- 3.26. Where an entirely new statutory function such as an integrity commission is to be established—administering investigative powers of an executive character<sup>13</sup> and quasi-judicial powers to conduct examinations, draw conclusions and make findings—there may be occasion for the Assembly to exercise its legislative and non-legislative powers<sup>14</sup> to make provision for the adjudication of parliamentary privilege claims in which the Assembly itself plays a central role.
- 3.27. The Office draws the committee's attention to arrangements that have applied in the Assembly, the NSW Parliament and the Australian Senate in relation to determination of claims of privilege in certain circumstances.
- 3.28. Through the development of a memorandum of understanding between the Speaker, the ACT Minister for Police, and the Chief Police Officer of the ACT, the Assembly has arrangements in place for dealing with claims of parliamentary privilege that emerge during the course of a search warrant executed by the Australian Federal Police (AFP). The MOU links to a standard operating procedure—*ACT parliamentary privilege and protocols (ACT Policing)*—which specifies that where a claim of privilege is made by an MLA during the course of the execution of a search warrant, the claim must be referred to the Speaker's office via the Clerk for consideration and determination.<sup>15</sup>

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<sup>12</sup> Campbell, Enid (2003) 'Parliamentary Privilege' Federation Press, p 38

<sup>13</sup> Even though both legislative proposals before the committee seek to make the commissioner an 'Officer of the Assembly', the investigative functions of a commission are primarily executive in nature. The designation of 'Officer of the Assembly' does not confer on a statutory officer any particular legal status—there are no implied functions, powers, rights, immunities or obligations arising from designation as an Officer of the Assembly and nor does the Assembly have any implied powers in relation to an Officer of the Assembly.

<sup>14</sup> See ss 21, 22, 24 of the *Australian Capital Territory (Self-Government) Act 1988*.

<sup>15</sup> To date, there has not been occasion to utilise the procedure so far as the Office is aware. Notwithstanding that the procedure provides that claims are to be referred to the Speaker for 'consideration and determination', it would be the practice that the Speaker would seek to place any question relating to the exercise of parliamentary privilege before the Assembly.

- 3.29. Similar arrangements exist in other jurisdictions.
- 3.30. For instance, there is a 2005 memorandum of understanding between the then presiding officers of the Commonwealth Parliament and the then Commonwealth Attorney-General in relation to the execution of search warrants on the premises of members or senators where parliamentary privilege may be involved.<sup>16</sup> Similarly, in 2009 the then presiding officers of the NSW Parliament entered into a memorandum of understanding with the Commissioner of the Independent Commission Against Corruption in relation to the execution of search warrants in the Parliament House offices of Members of Parliament.<sup>17</sup>
- 3.31. Such agreements represent a settlement between the Executive and the Legislative arms of government, which seeks to protect the integrity of parliament's democratic functions while at the same time ensuring that a commission or law enforcement body has the necessary tools to pursue possible offences that may have been committed or to investigate corrupt conduct that may have occurred.

### Independent arbitration process—claims in relation to documents or things

- 3.32. Standing order 213A establishes a mechanism for evaluating and determining public interest immunity claims made by the Executive in relation to documents that the Assembly has ordered be produced. The committee may wish to consider whether a similar procedure might be developed—with some adjustment—in relation to claims of parliamentary privilege asserted over documents or things.
- 3.33. Under such an arrangement, a legal arbiter appointed by the Speaker could evaluate any claim of parliamentary privilege (made by a person entitled to make such a claim—typically an MLA)<sup>18</sup> that arose during the exercise of a commission's powers and make a binding determination as to whether or not the claim was to be upheld.
- 3.34. There are precedents for such an approach to apply in determining parliamentary privilege claims over particular documents.
- 3.35. In the course of an AFP investigation into the unauthorised diversion and receipt of a member's email in 2001, the Assembly adopted arrangements, by resolution, for determining whether certain documents were to be covered by parliamentary privilege and whether or not they would be made

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<sup>16</sup> The MOU was published by the Senate Privileges Committee. See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Privileges/Completed\\_inquiries/2016-current/Documents\\_seized](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/2016-current/Documents_seized) accessed on 8 August 2018. There is also an MOU in place between the then Minister for Police and Emergency Management for Tasmania, the Attorney-General for Tasmania, the Speaker of the House of Representatives and the President of the Senate in relation to the execution of search warrants on Federal Members of Parliament.

<sup>17</sup> The MOU was published as an appendix in the Legislative Council's Privileges Committee's Report 71—'A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises'. See <https://www.parliament.nsw.gov.au/lcdocs/inquiries/1757/Report%20No.%2071%20-%20A%20revised%20memorandum%20of%20understanding%20with%20the%20ICAC.pdf> accessed on 8 August 2018. See Appendix A for further material.

<sup>18</sup> Although, as noted in Odgers', 'Documents would not have to be in the possession of a senator to attract the immunity. For example, documents such as briefing notes provided by an adviser to a senator for the purposes of proceedings in the Senate or a committee and in the possession of the adviser would be immune from seizure from the adviser' p 65. Similarly, where a parliamentary officer held documents which fell within the definition of proceedings in parliament the subject of a warrant, the Clerk would have grounds to assert the immunity.

available to the AFP following the execution of a search warrant. On 5 June 2002, the Assembly resolved that:

(1) The disposition of the documents sealed and delivered to the Clerk of the Assembly on 6 March 2002 following the execution of search warrants in the Assembly building be determined in accordance with this resolution.

(2) The Officer of the Australian Federal Police who is the warrant holder or another officer of the Australian Federal Police nominated by the warrant holder and the Clerk of the Assembly or his nominee examine the documents and the warrant holder or his or her nominee shall identify those documents he or she believes is material subject to seizure under the warrant.

(3) The Clerk of the Assembly or another person nominated by the Speaker after consulting with Party Leaders shall examine the documents identified pursuant to paragraph (2) and shall determine whether any of the documents are immune from seizure under search warrant by virtue of parliamentary privilege, having regard to the *Parliamentary Privileges Act 1987* in its application in the Territory, relevant court judgments relating to the interpretation and application of the Act, relevant precedents dealing with protection of documents of senators and members of the House of Representatives and such other matters as that person considers relevant...<sup>19</sup>

3.36. The determination procedure was modelled on an order of the Senate of 5 December 2000 following the direction by French J, in *Crane v Gething*, that certain documents in the custody of the Federal Court were to be delivered to the Clerk of the Senate and ‘dealt with in accordance with the directions of the President of the Senate’.<sup>20</sup> The Senate ordered that the former Secretary of the Commonwealth Attorney-General’s Department and former Australian Government Solicitor, Stephen Skehill, examine relevant documents and determine whether or not parliamentary privilege applied.<sup>21</sup>

3.37. The Office also draws the committee’s attention to advice given by the then Clerk of the Senate to the Senate Committee on Privileges in 2016, in which she advanced the following test for determining whether or not claims of parliamentary privilege should be upheld in relation to documents:

STEP 1: Were the documents **brought into existence** in the course of, or for purposes of or incidental to, the transacting of business of a House or a committee?

YES → falls within “proceedings in Parliament”.

NO → move to step 2.

STEP 2: Have the documents been **subsequently used** in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?

YES → falls within “proceedings in Parliament”.

NO → move to step 3.

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<sup>19</sup> Legislative Assembly for the ACT, *Minutes of Proceedings*, No. 10, 7 March 2002, pp 99-100.

<sup>20</sup> *Crane v Gething* (2000] FCA 45, at 50.

<sup>21</sup> *Journals of the Senate* No. 163, Tuesday, 5 December 2000, pp 3726-3727.

STEP 3 Is there any contemporary or contextual evidence that the documents were **retained or intended for use** in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?

YES → falls within “proceedings in Parliament”.

NO → report to the committee that there are documents which fail all three tests.

Notes: Individual documents may be considered in the context of other documents;

The assessor should divide the documents into those that satisfy any of the tests and those that satisfy none of the tests.<sup>22</sup>

- 3.38. In the event that the committee and the Assembly favoured the establishment of an arbitration process of some kind, grounding the authority for the process in either the standing orders or a continuing resolution of the Assembly would place determinations within the jurisdiction of the Assembly and would increase the likelihood that arbitrated outcomes are final. Any resolution or standing order would not purport to determine or to expand its own non-legislative powers.

### Examination of witnesses—compulsory questioning

- 3.39. The Office notes that both legislative proposals before the committee include coercive powers to facilitate the examination of witnesses. While it is expected that a commissioner, with an extensive grounding in the law, would be judicious in seeking not to stray into a line of questioning that engages s 16 of the Parliamentary Privileges Act, the possibility nonetheless exists that claims of parliamentary privilege could emerge during an examination or questioning.
- 3.40. The committee may wish to consider whether an independent arbitration process of the kind outlined above is able to be called upon to determine claims of privilege that arise in the course of an examination by a commission.
- 3.41. The Office notes that clause 164 of the Government’s exposure draft bill sets out the grounds for contempt of the commission. Refusal or failure ‘to answer a question relevant to the subject matter of the examination’ is such a grounds. However, clause 164(2) provides that a contempt will not have been committed where there is a ‘reasonable excuse’.
- 3.42. Against this background, an approach along the lines set out below could be applied.
1. In a case where a person entitled to make a claim of immunity based on parliamentary privilege asserted the immunity in the face of a particular question, or line of questioning, it would be for the commissioner to assess, in the first instance, whether there was a reasonable basis for the claim.
  2. Where the commissioner formed the view that, prima facie, the immunity claim enjoyed a certain credibility, it would be open to the commissioner to conclude that the refusal to answer was ‘reasonable’ for the purposes of clause 164(2) and would, therefore, not seek to press the

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<sup>22</sup> The test is a derivation of a similar test that had been developed by the NSW Legislative Council Privileges Committee and used by the NSW Legislative Council in a matter that involved the exercise of a warrant on the Hon. Peter Breen MLC by the NSW Independent Commission Against Corruption. The test proposed by the Senate Clerk was adapted to accommodate the definition of ‘proceedings in Parliament’ set out in s 16(2) of the Parliamentary Privileges Act. See 163<sup>rd</sup> Report of the Senate Committee of Privileges ‘Status of material seized under warrant Preliminary Report’ p 8.

line of questioning further.

3. However, in the event that the commissioner formed the view that a claim for immunity was erroneous or vexatious (for instance, it was claimed in relation to a matter with no conceivable nexus with proceedings in parliament), it could be open to the commissioner to seek a determination of the matter by the independent arbiter.
  4. In the event that the independent arbiter determined that the claim did not hold up, it would then be open to the commission to proceed with the questioning.
  5. Where the commission encountered continued refusal by the witness to answer questions, despite the arbiter having determined that an immunity claim was not successful, and where no other reasonable excuses were tendered, the commission could seek an application to the Supreme Court to deal with a contempt (in accordance, for instance, with clause 165 of the Government's exposure draft bill) on the basis that there was no reasonable excuse for a refusal or failure to answer a question.
- 3.43. Such an approach could militate against erroneous or vexatious claims relating parliamentary privilege being made in the context of an examination, while at the same time ensuring that the commission itself did not capriciously or arbitrarily stray into territory over which reasonable claims of parliamentary privilege could be made.<sup>23</sup>

- 3. The Office submits that the committee consider the merits of establishing an independent arbitration process to determine parliamentary privilege claims that arise during the exercise of an integrity commission's powers through an independent, arms-length, apolitical process with the following features:**
- a) the authority for the process would be established by way of continuing resolution or standing orders;**
  - b) the arbiter would be appointed by the Speaker following consultation with the Standing Committee on Administration and Procedure;**
  - c) there would be a requirement that the arbiter is an eminent legal professional of high standing such as a former Judge, Justice or possibly a Queen's or Senior Counsel;**
  - d) provision would be made for the arbiter to consult with, and be advised by, persons with relevant technological, parliamentary or other expertise;**
  - e) where a large volume of documents is to be evaluated, the arbiter would be permitted to be assisted by suitably qualified persons operating under the direction of the arbiter;**
  - f) in evaluating relevant information, documents or things and making a determination, the arbiter would have regard to the Parliamentary Privileges Act, case law relating to the interpretation of the Parliamentary Privileges Act, relevant reports of both the Assembly's and the Commonwealth Parliament's privileges committees, and the test outlined at**

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<sup>23</sup> It is conceivable that the Assembly's own contempt powers could be enlivened where the Assembly determined that the commission's conduct constituted improper interference in the Assembly's proceedings.

paragraph 3.37 of this submission;

g) the arbiter would report to the Assembly and the commission with a decision which would be binding and final;

h) detailed procedures associated with the handling of documents or things and other operational requirements may be developed by MOU or some other agreement between the Speaker, on behalf of the Assembly, and the commission.

### Further consideration by administration and procedure committee

4. The Office submits that where the committee and the Assembly favour the establishment of an independent arbitration process, the Standing Committee on Administration and Procedure further consider:

a) the scope and content of changes to the standing orders or continuing resolutions required to effect independent arbitration arrangements;

b) the scope, content and mode of any associated MOU, agreement or procedures; and

c) relevant legal issues.

## 4. LEGISLATIVE ASSEMBLY STANDARDS COMMISSIONER AND ETHICS AND INTEGRITY ADVISER

4.1. The Office notes that the Legislative Assembly Commissioner for Standards has a jurisdiction conferred by Assembly resolution (continuing resolution 5AA), to investigate and report on compliance with Members' Code of Conduct (continuing resolution 5) or the declaration of members' private interests (continuing resolution 6). The Assembly's Ethics and Integrity Adviser is established by continuing resolution 6A to:

- advise Members of the Legislative Assembly, when asked to do so by a member on ethical issues concerning the exercise of his or her role as a Member (including in relation to the use of entitlements and potential conflicts of interest).
- give advice that is consistent with any code of conduct or other guidelines adopted by the Assembly (but does not include the provision of legal advice).

4.2. The Office submits that neither of these roles should be displaced by legislation or other arrangements establishing an integrity commission. The Office notes that neither of the two legislative proposals before the committee appear to explicitly displace these arrangements. However, the Office considers that a possible confusion could arise from the definition of 'corrupt conduct' in the private member's bill being linked to the Member's Code of Conduct. This is addressed later in the Office's submission.

5. The Office submits that the legislation and associated arrangements for the establishment of an integrity commission should not displace the roles of the Legislative Assembly Commissioner for Standards or the Ethics and Integrity Adviser.

## 5. PROVISION OF ADVICE AND SUPPORT TO THE SPEAKER

- 5.1. Section 37B of the *Auditor-General Act 1996* and s 339 of the *Electoral Act 1992* make provision for the Speaker to seek administrative support or advice from the Office of the Legislative Assembly or 'another entity that is able to provide impartial administrative support or advice' in exercising the Speaker's statutory functions.

**6. In the event that an integrity commissioner is to be an Officer of the Assembly, the Office submits that committee consider the inclusion of a provision in any bill establishing an integrity commission that the Speaker may seek administrative support or advice in the exercise of the Speaker's statutory functions.**

## 6. ACCOUNTABILITY

### Oversight committee

- 6.1. Both legislative proposals before the committee make provision for an oversight committee, which is an important feature of an integrity system.
- 6.2. Both legislative proposals refer to the 'relevant Assembly committee' which is given the meaning of 'the committee of the Legislative Assembly whose functions include the examination of matters related to corruption and integrity in public administration'.<sup>24</sup> The relevant Assembly committee is to perform a range of oversight and accountability functions in relation to a commission and an inspector.
- 6.3. To effect such a provision, the Assembly will need to consider whether it wishes to: a) amend the resolution of appointment for an existing standing committee; or b) to establish a new standing committee by resolution of appointment, noting that it is the latter course (i.e. a separate, standalone committee) that has typically been established in other jurisdictions to oversee integrity commissions of one kind or another.

**7. The Office submits that the committee consider the most appropriate oversight committee for an integrity commission and whether the resolution of appointment for an existing standing committee be amended or a new standing committee is established.**

### Managing conflicts of interest within a commission

- 6.4. The office submits that it would be prudent to make statutory provision for a mechanism by which conflicts of interest must be declared by staff in a commission and effectively managed in an accountable manner.
- 6.5. In addition to clause 113 of the Government's exposure draft bill, there is scope to codify the requirement for the establishment of a register to record: a) any interests held by a staff member of the commission that could affect the impartial exercise of a commission's functions; and b) any steps that have, in fact, been taken to manage such conflicts to the satisfaction of the commissioner.

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<sup>24</sup> See page 256 of the exposure draft Integrity Commission Bill 2018 and page 132 of the Anti-corruption and Integrity Commission Bill 2018.

**8. The Office submits that the committee consider whether statutory provision be made in order that:**

**a) a commission is required to establish a register of conflicts of interest that have been declared and that the register include steps that have been taken to effectively manage any conflicts to the satisfaction of a commissioner;**

**b) the register is made available to an inspector;**

**c) an inspector must report to the relevant Assembly committee on the extent to which conflicts of interest are being effectively managed by a commission.**

6.6. Such an approach would enable systematic consideration by an inspector of possible conflicts and for the relevant Assembly committee to have general visibility over the arrangements that have been adopted by a commission to manage them.

## **7. APPOINTMENT OF A COMMISSIONER, INSPECTOR**

7.1. There are accountability and transparency benefits in clearly prescribing a recruitment and appointment process and selection criteria in relation to a commissioner and an inspector. The Office submits that the committee's views on the both the content and form that such arrangements might take would be of great value in forming the basis of a suitable process architecture for the appointment of the positions.

7.2. The Office notes that both the private member's bill and the Government's exposure draft bill include a requirement that the Assembly must pass a resolution with a 2/3rds majority before an appointment is able to be made to the positions of commissioner and inspector. This requirement ensures broad political support for any appointment.

7.3. However, to ensure that suitable and eligible candidates are not dissuaded from applying for these appointments on the basis that a possible failure to secure the support of the Assembly could adversely affect candidates' reputations, there would need to be a high degree of confidentiality around the appointment process. It would also be prudent for a practice to emerge whereby the Speaker would only seek to move a motion on the floor of the Assembly in relation to a prospective appointee where the Speaker was reasonably satisfied that the appointee had the confidence of at least 2/3rds of the Assembly membership.

7.4. Both legislative proposals provide for appointment arrangements in relation to a commissioner and commission inspector, including:

- the positions are to be appointed by the Speaker;
- a range of consultation requirements are to apply in making the appointments;
- there are certain requirements expressed in relation to the knowledge and experience that must, to the satisfaction of the Speaker, be held by appointees; and
- the positions are to be designated officers of the Assembly.

7.5. Notwithstanding that general requirements are specified in both legislative proposals around the

knowledge and experience that a commissioner or inspector must have, the committee may wish to consider the inclusion of a statutory requirement for more detailed selection criteria. In this regard, the Office directs the committee's attention to s 4AA of the *Supreme Court Act 1933*, which establishes a requirement to notify selection criteria and the process for selecting a person to a resident judge.

- 7.6. The committee may also wish to consider, having regard to the literature on the subject, as to what selection criteria ought to apply in relation to these appointments. Although the positions are not substantively judicial, there are elements of a commissioner's functions that have a quasi-judicial character. Against this background, should the committee wish to consider codified selection criteria for the appointments, it is directed to a comparative study on judicial appointments prepared by the Judicial Conference of Australia.<sup>25</sup>
- 7.7. Separate from any consideration that the committee may wish to give to the eligibility criteria and other conditions that might be codified in statute or legislative instrument, the Office submits that it would be useful for the committee to turn its mind to the particular process requirements that might be adopted in relation to the selection and recruitment of eligible and suitable candidates for the positions of commissioner and inspector.
- 7.8. Since the establishment of the 'Officer of the Assembly' designation in 2013, the Speaker has been involved in making arrangements for the appointment of the Electoral Commissioner, members of the Electoral Commission and the Auditor-General. An 'open and accountable selection process' is required in relation to appointments.<sup>26</sup> To meet this and other legislative requirements, an appointment process with the following features has typically applied:
- a recruitment consultant is engaged by the Office of the Legislative Assembly to advise the Speaker on the selection and recruitment aspects of the appointment process and perform relevant administrative tasks;
  - expressions of interests are sought through local and national advertising;
  - an executive search may be undertaken by the consultant to identify persons that are likely to be both suitable and eligible for the position;
  - an appointment advisory panel, consisting of three suitable persons with skills and experience relevant to the position, is established by the Speaker;
  - candidates are evaluated by the advisory panel against relevant selection criteria (where these exist) or on the basis of candidates' capacity to perform the relevant statutory functions;
  - a recommendation is made by the advisory panel, on the basis of a selection report, to the Speaker and where the Speaker agrees to the recommendation, the recommendation is provided to the relevant Assembly committee;
  - the Speaker consults with the Chief Minister, Leader of the Opposition and the leader of a

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<sup>25</sup> Judicial Conference of Australia (2015) 'Judicial Appointments A Comparative study' accessed on 2 August 2018 from [http://www.jca.asn.au/wp-content/uploads/2013/10/P17\\_02\\_42-RESEARCH-PAPER-final.pdf](http://www.jca.asn.au/wp-content/uploads/2013/10/P17_02_42-RESEARCH-PAPER-final.pdf). See also 'Framework for Judicial Abilities and Qualities for Victorian Judicial Officers' prepared by the Judicial College of Victoria, accessed on 2 August 2018, from [http://www.judicialcollege.vic.edu.au/sites/default/files/2009JCVFramework-JCVsite\\_0.pdf](http://www.judicialcollege.vic.edu.au/sites/default/files/2009JCVFramework-JCVsite_0.pdf)

<sup>26</sup> See s 8(2)(d) of the *Auditor-General Act 1996* and s 12(2)(d) of the *Electoral Act 1992*.

- registered party with two or more MLAs who are members of the party; and
- where both the relevant Assembly committee and the Speaker agree to the appointment, the candidate is advised and the appointment is made by legislative instrument.
- 9. The Office submits that the committee consider the merits of including statutory provision for the establishment of selection criteria and an appointment process for the positions of commissioner and inspector along the lines of s 4AA of the *Supreme Court Act 1933*.**

### Eligibility versus ‘knowledge and experience’ requirements

- 7.9. The Office queries whether the criteria outlined at clause 25(3)(a) of the Government’s exposure draft bill sufficiently align with the eligibility provisions at clause 26(1). For instance, of the three criteria listed at clause 25(3)(a), arguably only ‘criminal adjudication’ aligns with the roles that are typically performed by judges or justices as provided for at 26(1).
- 7.10. Similarly, the Office notes that clause 96(3)(a) of the private member’s bill proposes that the Speaker must not appoint a person unless the person has extensive knowledge of, and experience in, integrity and accountability in public administration. Although clearly such experience and knowledge would be an important consideration in the appointment process, the Office queries whether the prerequisite aligns with the eligibility provisions at clause 98, which provide that a person is only eligible for appointment where the person is a former judge or justice, or a lawyer of at least 10 years.
- 7.11. In the event that the Assembly agrees that selection criteria and a selection process for the appointment of commission should be specified in a legislative instrument, it may be appropriate to revisit these clauses.

### Terms of appointment

- 7.12. The Office notes that under the Government’s draft legislation, the commissioner and CEO must not be appointed for longer than 7 years.
- 7.13. In the event that the positions are filled at approximately the same time, and both were appointed for the maximum 7 years, the continuity of the commission’s operations could be affected when both terms conclude seven years later.
- 7.14. Where, for instance, both the CEO and the commissioner’s terms expired within several months of one another, there would be little opportunity for handover and exchange of knowledge about current investigations, operational matters etc.

- 10. The Office submits that the committee consider the appropriate length of the term of appointment of a commissioner and CEO of a commission in order to facilitate the effective continuity of the commission’s operations**

### Suspension of commissioner / inspector

- 7.15. The Office notes that although bankruptcy or insolvency are grounds to end the commissioner’s (clause 36(1)(b) of the Government’s exposure draft bill) and the inspector’s appointment (clause 233(1)(b)), bankruptcy or insolvency are not grounds for suspension.
- 7.16. The Office notes that clause 105 of the private member’s bill sets out grounds for suspension of the

commissioner. The Office sees value in clause 105(b) relating to failure to take reasonable steps to avoid being placed in a conflict of interest as grounds. However, again, the Office notes that bankruptcy or insolvency are not included as grounds for suspension. Similarly, at clause 137 of the private member's bill relating to suspension of the inspector, neither bankruptcy nor insolvency are listed as grounds.

- 7.17. Including bankruptcy or insolvency as grounds for suspension would allow for the suspension of an office holder while an allegation was investigated and prior to a decision being made about ending the appointment.

**11. The Office submits that the committee consider bankruptcy and insolvency as grounds for suspension of a commissioner or inspector.**

### **Ineligibility for appointment**

- 7.18. The Office notes that clause 98 of the private member's bill does not render a person who has committed an offence ineligible for appointment.
- 7.19. The Office submits that on the basis that a commission, its commissioner, its staff (including its CEO) and an inspector of a commission ought to be beyond reproach, there is a public interest in excluding people convicted of an offence punishable by imprisonment for at least 1 year.

**12. The Office submits that the committee consider inclusion of a provision or provisions in legislation rendering a person ineligible for appointment as commissioner, inspector, CEO of a commission, or staff of a commission where a person has been convicted of an offence punishable by imprisonment for at least 1 year.**

## **8. FUNCTION OF COMMISSION**

- 8.1. The Office notes clause 23(f) of the Government's exposure draft bill, which provides, inter alia, that it is a function to 'foster public confidence in, and to give leadership to, the Legislative Assembly and public sector'.
- 8.2. While there is a legitimate role for a commission to provide advice, training and education services to the Assembly (as provided for in clause 23(e)(i)), the Office queries whether it is the proper role of an integrity commission to provide 'leadership' to the legislative arm of government in the Territory.
- 8.3. The Office notes that clause 6(2)(iv) of the private member's bill provides that it is an object of the bill that the Anti-corruption and Integrity Commission provide leadership and coordination for both the public sector and parliamentary integrity frameworks. Clause 93(1)(e) proposes to give, inter alia, the commission the function of 'giving leadership to ... the parliament...'
- 8.4. Clause 93(2)(d) of the private member's bill proposes to give the commission a function to provide advice to the Legislative Assembly about the parliamentary integrity framework. While there could be occasions where it might be necessary for the commission to bring the attention of the Assembly to certain inadequacies within, or improvements that could be made to, the Assembly's integrity arrangements, the Office notes that both the Legislative Assembly Commissioner for Standards and the Ethics and Integrity Adviser exercise a similar function.

- 8.5. The Office queries whether it should be the role of a statutory commission to exercise a leadership or coordination function in relation to the legislative arm of government.

**13. The Office submits that the committee consider the propriety or otherwise of conferring on a commission the statutory function of providing 'leadership and coordination' in respect of the Assembly's integrity frameworks.**

**14. The Office submits that the committee consider the propriety or otherwise of conferring on a commission the statutory function of providing 'leadership' to the legislative branch of government.**

## **9. LIAISON WITH THE LEGISLATIVE ASSEMBLY STANDARDS COMMISSIONER**

- 9.1. Clause 53(2) of the Government's exposure draft bill makes provision for the commission to liaise with public sector entities and to avoid needless duplication of work. Pursuant to clause 54, the commission may also enter into a memorandum of understanding with another entity to avoid delay and duplication of statutory functions and to efficiently manage the interaction between statutory functions of the parties to the MOU.
- 9.2. Although the Legislative Assembly Commissioner for Standards does not operate under a statutory framework and is not a public sector entity, given the Standards Commissioner's involvement in investigating complaints about certain aspects of the members' conduct and the possible intersection of such investigations with the exercise of functions by a commission, there may be value in making provision for similar liaison arrangements to be established between a commission and the Commissioner for Standards.
- 9.3. The Office notes that the private member's bill contemplates an approach broadly along these lines at clause 150(2)(c), which provides that an MOU may include 'a protocol for referring matters to the Commissioner for Standards'.
- 9.4. However, to be clear, the Office considers that any requirements to be imposed on the Commissioner for Standards in relation to referrals to a commission ought to be established by way of amendment to continuing resolution 5AA, while any capacity for a commission to make a referral to the Commissioner for Standards could be achieved via statutory provision (for instance, by way of the combined effects of clause 102(e) of the Government's exposure draft bill, which establishes the Commissioner for Standards as a 'referral entity', and clause 103 which enables a commission to make referrals).
- 9.5. Notwithstanding this, an agreement between a commission and the Commissioner for Standards setting out detailed liaison and referral arrangements may be of value so long as any agreement is not inconsistent with the standing orders or resolutions of the Assembly.

**15. The Office submits that the committee consider the merits of making provision for the development of liaison and referral arrangements between a commission and the Legislative Assembly Commissioner for Standards and the most suitable form for such arrangements.**

## 10. SUSPENSION OF CEO

- 10.1. The Government's exposure draft bill provides for the appointment of a CEO of a commission, along with arrangements for ending the appointment of the CEO. However, there are no explicit provisions in the bill for the suspension of the CEO by the commissioner.
- 10.2. The Office queries whether these arrangements default to broader arrangements that apply elsewhere in the public sector or whether it is appropriate to codify suspension arrangements in statute.
- 10.3. A provision could, for instance, enable a commissioner to suspend a CEO where there were reasonable grounds to suspect that one of the conditions set out in clause 41 had been met, thereby providing an opportunity to investigate whether sufficient grounds for ending the appointment are made out.

**16. The Office submits that the committee consider whether explicit legislative provision ought to be made in relation to the suspension of the CEO of a commission.**

## 11. REMOVE PRECONDITION FOR REFERRAL

- 11.1. Clause 103(1)(a) of the Government's draft exposure bill provides that 'The commission may, at any time, refer a corruption report to a referral entity if—(a) the commission has the power to investigate the corruption report...'. The Legislative Assembly Commissioner for Standards, the Speaker and the Deputy Speaker are 'referral entities' pursuant to clause 102.
- 11.2. The provision at clause 103(1)(a) would seem to prohibit the commissioner reporting to the Speaker, the Deputy Speaker, or the Legislative Assembly Commissioner for Standards where the matter the subject of the corruption report was within the sole jurisdiction of the Assembly (for example, matters relating to the code of conduct or matters relating to proceedings that involve a possible contempt).
- 11.3. The Office submits that it would be prudent to legislate in such a way as to enable a commission to refer matters—whether via a corruption report or some other referral mechanism— to the Speaker, Deputy Speaker, and Commissioner for Standards even where a commission did not have a power to investigate. It could be, for instance, that a person makes a complaint to a commission which the commission determines does not meet the relevant statutory threshold for corrupt conduct but which does potentially engage the code of conduct for members, a possible breach of standing orders, or a contempt of the Assembly (none of which the commission has a power to investigate). In such a case, the existing clause 103(1)(a) could leave the commission without a viable referral pathway.
- 11.4. Clause 57(4)(d) of the Government's exposure draft bill makes the Legislative Assembly Commissioner for Standards a 'relevant entity' for the purposes of referring corruption complaints. While this provision provides a legal basis for a referral to the commission by the Commissioner for Standards, as noted earlier a provision requiring referrals by the Commissioner of Standards should be done via resolution on the basis that the Commissioner for Standards is a creature of the Assembly, rather than a statutory officer.
- 11.5. Noting clause 65 of the private member's bill, which enables the commission to refer certain

matters to persons or bodies, the Office submits that for the sake of clarity it would be useful to include the Legislative Assembly Commissioner for Standards as a person to whom the commission may refer matters pursuant to resolution. However, if this course was to be pursued, clause 66(2), which provides that the commission cannot give a direction to the Speaker or a judicial officer, ought to include the Legislative Assembly Commissioner for Standards.

- 17. The Office submits that provision be made in legislation to permit an integrity commission to refer matters to the Legislative Assembly Commissioner for Standards, Speaker or Deputy Speaker where those matters fall within the respective jurisdiction of the Commissioner for Standards, the Speaker or the Deputy Speaker (notwithstanding that a commission itself might not have an investigative jurisdiction in a particular matter).**
- 18. The Office submits that the Standing Committee on Administration and Procedure consider possible amendments to continuing resolution 5AA so as to require that where the Legislative Assembly Commissioner for Standards, in exercising his or her jurisdiction, reasonably suspects that conduct falling within the statutory definition of corrupt conduct has occurred, he or she must report the suspected conduct to an integrity commission.**
- 19. The Office submits that a commission not be empowered to give a direction to the Legislative Assembly Commissioner for Standards in relation to the exercise of the Commissioner for Standards' functions under continuing resolution 5AA.**

## **12. REQUIREMENT TO GIVE THE COMMISSION A REPORT**

- 12.1. Clause 104(1) of the Government's exposure draft bill provides that the commission may ask for a referral entity to report to the commission on the results of an investigation and any action taken, or proposed to be taken, in relation to the report.
- 12.2. The Office submits that this provision should not apply to the Speaker, Deputy Speaker, and Legislative Assembly Commissioner for Standards on the basis that referrals to these three referral entities will, by their very nature, be matters that will fall within the jurisdiction of the Assembly (pursuant to either resolution or standing orders). The Office submits that these three referral entities should be included at clause 104(2) so as to disapply clause 104(1).

- 20. The Office submits that where legislation empowers a commission to make directions in relation to an entity to which a corruption report has been referred, the Speaker, Deputy Speaker and Legislative Assembly Commissioner for Standards ought not to be subject to such a direction.**

## **13. CODE OF CONDUCT BREACH SHOULD NOT, IN AND OF ITSELF, BE CORRUPT CONDUCT**

- 13.1. In the private member's bill, clause 7(1)(a)(iv)(A) provides that corrupt conduct, in the case of a minister or Member of the Legislative Assembly, is conduct that could constitute or involve a 'substantial breach of an applicable code of conduct'.<sup>27</sup> The provision would appear to invite a

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<sup>27</sup> At clause 7(3), the bill defines applicable code of conduct as '(a) in relation to a Minister—a ministerial code of conduct prescribed or adopted for this section by regulation; and (b) in relation to a member of the Legislative Assembly (including a Minister)—a code of conduct adopted for this section by resolution of the Legislative Assembly.

commission to draw conclusions about a members' compliance with a resolution of the Assembly (continuing resolution 5), which is a role that rests with the Legislative Assembly Commissioner for Standards and the Assembly itself.

- 13.2. To be clear, the Office supports a legislative proposal which places the conduct of MLAs within the commission's ambit but submits that a definition of corrupt conduct ought not to rely, even in part, on a reference to a code of conduct established under resolution, which is directed towards an entirely different purpose (i.e. the code of conduct was not drafted in such a way as to be a yardstick for assessing corrupt conduct but instead seeks to capture a far broader range of mandated, rather than proscribed, conduct).
- 13.3. The Office submits that the language included in other elements of clauses 7 and 8 of the private member's bill are sufficient to capture the conduct which is at the heart of the concept of corrupt conduct, including in relation to members, without the need to include a reference which draws in continuing resolution 5.

**21. The Office submits that the Code of Conduct for all MLAs, made pursuant to Assembly resolution, ought not to be referenced in any statutory definition of corrupt conduct.**

#### **14. DUTY TO TELL COMMISSION ABOUT CORRUPT CONDUCT**

- 14.1. The Office notes that clause 12 of the private member's bill sets out requirements for the reporting of corrupt conduct. Clause 61 of the Government's exposure draft bill seeks to require that an MLA or staff member of an MLA must report corrupt conduct on the part of an MLA or staff member of an MLA where a suspicion arises on reasonable grounds. There would appear to be a public interest in establishing such a duty.

**22. The Office submits that the committee consider the merits of statutory provision establishing a duty for all MLAs and all staff and contractors employed by MLAs to notify a commission where they reasonably suspect corrupt conduct on the part of an MLA, staff or contractors employed by MLAs.**

#### **15. DEALING WITH PARLIAMENTARY PRIVILEGE CLAIMS**

- 15.1. The Office notes that clause 55 of the private member's bill would require that an MOU would be the mechanism by which claims in relation to parliamentary privilege would be determined and, in the absence of an MOU, clause 56 would apply.
- 15.2. However, it would appear that notwithstanding the combined operation of clauses 55 and 150, clause 57 would enable the commission to apply to the Supreme Court to determine parliamentary privilege in relation to:
- whether a secured item under clause 56(4)(b) is the subject of parliamentary privilege; or
  - whether evidence that the commission has, or seeks to obtain, in order to carry out its functions is the subject of parliamentary privilege.
- 15.3. The committee is referred to the Office's submission above in relation to the establishment of an independent arbitration process for determining claims of privilege.

**23. The Office submits that the committee consider the role that the commission might have in referring claims relating to parliamentary privilege to the Supreme Court.**

## **16. ROLE OF THE CLERK**

- 16.1. The Office notes that clause 53 of the private member's bill provides that the Clerk may be appointed the 'representative' of a claimant making an immunity claim in relation to parliamentary privilege. In the event that the Division 4.4 of the private member's bill relating to parliamentary privilege claims is proceeded with, the Office submits that the Clerk ought not be given the role of a 'claimant's representative'.

**24. The Office submits the Clerk not be given a role, pursuant to statutory requirement, to represent a claimant in relation to a claim of parliamentary privilege.**

- 16.2. The Office notes that clause 54 of the private member's bill provides that an investigator must give notice to the Clerk of the Assembly where an investigator intends to inspect, copy or seize a document or thing. The Office submits that it is the Speaker, rather than the Clerk, that ought to be advised in such an event.

**25. The Office submits that the Speaker, rather than the Clerk, ought to be notified in the event that a search warrant is to be executed in relation to an MLA or the Assembly or where parliamentary privilege is potentially engaged.**

## **17. CONFIDENTIAL REPORTS TO BE GIVEN TO RELEVANT COMMITTEE**

- 17.1. The Office notes that clause 63 of the private member's bill provides that the commission must give a copy of a confidential report to the presiding officer of the relevant Assembly committee. The Office submits that for the sake of clarity, the requirement should be to give the confidential report to the 'relevant Assembly committee', rather than to the presiding member, on the grounds that an Assembly committee has a procedural status that the presiding member alone does not possess.
- 17.2. It may be useful to consider the inclusion of a reporting requirement whereby the committee must advise the Assembly that it has received such a report.

**26. The Office submits that the committee consider whether legislative provision be made in order that a confidential report may be given to the relevant Assembly committee by a commission, rather than to the presiding officer of the relevant Assembly committee.**

**27. The Office submits that the committee consider whether legislative provision be made so that where a committee receives a confidential report from a commission, the committee must notify the Assembly that it has received such a report.**

## **18. DECLARATION OF INTERESTS—COMMISSIONER AND INSPECTOR**

- 18.1. The Office notes that clause 101 of the private member's bill provides for a declaration of interests to be made to the Speaker. Clause 101(2)(b) provides that information that the Speaker believes on reasonable grounds is inappropriate to disclose is not required to be made publicly available.
- 18.2. There could be value in including a requirement that the undisclosed information is to be made

available to the inspector and the relevant Assembly committee.

- 18.3. Clause 133 makes provision in relation to a declaration of interests by the inspector along similar lines.

**28. The Office submits that the committee consider legislative provision in relation to declarations of interests on the part of a commissioner, inspector and CEO of a commission in order that: a) the relevant Assembly committee is given access to all declarations made by an inspector; b) an inspector is given access to all declarations made by a commissioner and CEO (irrespective of whether the Speaker considers that certain information ought not to be made publicly available via a website).**

## **19. MEMBERS' DECLARATION OF INTERESTS—WAIVER OF PRIVILEGE**

- 19.1. The Office notes that in 2012 the NSW Parliament passed the ICAC Amendment (Register of Members) Bill which amended the Independent Commission Against Corruption Act to essentially waive the application of parliamentary privilege in relation to the pecuniary register of members' interests. The provision at s 122(2) of the Act states that:

(2) The Commission may use a relevant register:

(a) for the purpose of any investigation into whether or not a member of Parliament publicly disclosed a particular matter or as to the nature of any matter disclosed, and

(b) for the purpose of any finding, opinion or recommendation concerning the disclosure or non-disclosure,

and for that purpose Parliament is taken to have waived any parliamentary privilege that may apply to the register.

- 19.2. The provision applies notwithstanding that s 122(1) of the Act provides that, 'Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament' as, rather than abrogating the privilege in a general way, the provision waives the assertion of the privilege, by the parliament, in a single limited domain.
- 19.3. There are public interest arguments that can be advanced as to the desirability of such a waiver in ACT legislation, bearing in mind a jurisdiction is conferred on the Legislative Assembly Commissioner for Standards, through continuing resolution 5AA, in relation to investigating compliance with the members' registration or declaration of interests.
- 19.4. This would not, however, prevent a provision similar to s 122(2) from being included in establishing legislation—an integrity commission could be permitted to draw inferences and make findings in relation to corrupt conduct (as provided for under statute) on the basis of the declaration or the non-declaration of the interests of an MLA, while the Commissioner for Standards would continue to have jurisdiction to investigate possible breaches of the relevant Assembly resolutions.

## **20. REGISTRAR OF LOBBYISTS**

- 20.1. The Office notes the comments made in the Clerk's submission to the 2017 Select Committee on an

Independent Integrity Commission in relation to the register:

When the existing procedural arrangements were adopted to establish a register of lobbyists, the Assembly did so in the absence of any specific proposal to establish a public sector integrity commission. With such a proposal now before the committee, it is timely to consider the role that such a commission, were one to be established, might play in administering lobbyist regulations and guidelines.<sup>28</sup>

My view is that an integrity commission with broad statutory responsibilities in relation to public sector integrity would well placed to administer and oversee lobbying obligations and requirements as they apply to persons employed under the Public Sector Management Act. Consideration could even be given to statutory or regulatory codification of relevant lobbying arrangements as has been done in Queensland where that state's integrity commissioner administers the scheme.<sup>29</sup> Such arrangements needn't depart significantly from the broad principles and provisions that have been embodied in the relevant Assembly resolutions.<sup>30</sup>

20.2. The ACT is the only jurisdiction in Australian in which a parliamentary Clerk administers a lobbyists registration scheme. An alternative approach would be to:

- make statutory provision for the lobbyist register and related requirements;
- vest the function of Registrar of Lobbyists in the commissioner or a delegate of the commissioner (for instance the CEO of a commission);
- make a legislative instrument containing the ACT Lobbying Code of Conduct (along the lines currently provided for in continuing resolution 8AB);
- make a legislative instrument establishing particular requirements in relation the registration of lobbyists (along the lines currently provided for in continuing resolution 8AC); and
- repeal continuing resolutions 8AB and 8AC.

**29. The Office submits that the committee consider: a) establishing the register of lobbying by way of legislative instrument made pursuant to statutory provision in legislation establishing a commission; b) vesting in a commissioner or delegate of the commissioner the registrar function; and c) repealing relevant continuing resolutions of the Assembly.**

## 21. PUBLIC INTEREST DISCLOSURE ACT

21.1. The Office draws to the committee's attention to comments made in the Clerk's submission to the 2017 Select Committee on an Independent Integrity Commission concerning the role of the Clerk in the *Public Interest Disclosure Act 2012*:

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<sup>28</sup> I query whether the Clerk of the Legislative Assembly is the most appropriate administrative locus for operating a register of lobbyists that applies across the entire ACT public sector. As noted earlier in my submission, the ACT is the only jurisdiction in Australian with such an arrangement. It is also the case that the Clerk's role in receiving complaints about members' conduct vis-a-vis lobbying activities gives rise to the same sorts of conflict that I outlined in relation to the matters associated with public interest disclosures.

<sup>29</sup> See the [Integrity Act 2009](#) (QLD)

<sup>30</sup> Clerk's submission to the Select Committee on an Independent Integrity Commission, authorised 18 May 2017, p 39.

... the Clerk is currently required to investigate MLAs and their staff in relation to disclosable conduct pursuant to the PID Act.

I regard this as undesirable both as a matter of principle and as a practical matter.

The primary statutory role of the Clerk of the Legislative Assembly (and indeed the historical role of parliamentary clerks more generally) is to advise and support members in relation to administrative and procedural matters associated with their parliamentary roles. Critical to the integrity of this role is that the Clerk's advice is independent, accurate and confidential. A Clerk's first loyalty is to the institution of parliament itself—to its traditions, its practices and procedures and the democratic functions that it performs of behalf of electors. I submit that the obvious conflicts that arise by giving to the Clerk a responsibility for investigating those to whom he or she is duty bound to advise are, for the most part, insurmountable. How might, for instance, the Clerk properly advise an MLA on a matter of parliamentary privilege where that matter happened to be relevant...?

Further, the Clerk has no authority to make findings or to impose penalties on MLAs or their staff (either by virtue of the PID Act or any other source of authority). While the Clerk is able to refer potentially criminal conduct to the AFP (see s 21), administrative mechanisms that are available to make findings and impose penalties in relation to, say, staff of the Office, are not available to the Clerk in respect of MLAs and their staff. Such an arrangement means that Clerk is potentially placed in a position where he or she is required to investigate an allegation of disclosable conduct but is constrained in the extent to which he or she might be able to address that conduct.<sup>31</sup>

**30. The Office submits that the PID Act should be amended as soon as practicable in order that the Clerk no longer has a responsibility for investigating or addressing PID matters in relation MLAs or their staff and consideration be given to whether an integrity commission is a more suitable body for this function.**

## **22. AUTHORITY FOR THE SPEAKER TO APPOINT A PERSON TO INVESTIGATE AN INSPECTOR**

- 22.1. The Office notes that neither legislative proposal before the committee appears to make provision for an investigation to be carried out in relation to the position of inspector. Such an investigation may be necessary to satisfy the Speaker and the relevant committee that there are grounds for ending the appointment of an inspector. Giving the Speaker the authority to appoint a person to carry out such an investigation would address this.

**31. The Office submits that the committee consider the merits of legislative provision to enable the Speaker to appoint a person to investigate an inspector where there are reasonable grounds to suspect misconduct.**

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<sup>31</sup> Clerk's submission to the Select Committee on an Independent Integrity Commission, authorised 18 May 2017, p 37.

## APPENDIX A

In considering these matters, the committee may also be interested to consider the following reports of the Senate Committee of Privileges:

- 168<sup>th</sup> Report — ‘Parliamentary Privilege and the use of intrusive powers’ (28 March 2018);
- 164<sup>th</sup> Report — ‘Search Warrants and the Senate’ (28 March 2017);
- 114<sup>th</sup> Report — ‘Execution of Search Warrants in Senators’ Office—Senator Harris’ (26 June 2002); and
- 75<sup>th</sup> Report — ‘Execution of Search Warrants in Senators’ Offices’ (22 March 1999).

The following reports of the NSW Legislative Council’s Standing Committee on Parliamentary Privilege and Ethics may also be of interest:

- Report 71 — ‘A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members’ premises’ (November 2014);
- Report 47 — ‘Inquiry into a memorandum of understanding with the ICAC relating to the execution of search warrants on members’ offices’ (November 2009);
- Report 33 — ‘Inquiry into Protocols for execution of search warrants on members’ offices (February 2006);
- Report 28 — ‘Parliamentary privilege and seizure of documents by ICAC’ No. 2 (March 2004); and
- Report 25 — ‘Parliamentary privilege and seizure of documents by ICAC’ No. 1 (December 2003).