ACT BAR ASSOCIATION

19 May 2017

The Secretary
Select Committee on an Independent Integrity Commission
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

via email: committees@parliament.act.gov.au

Dear Secretary,

Inquiry into the establishment of an independent integrity commission for the ACT

The ACT Bar Association ("the Bar") welcomes the opportunity to make a submission to the Select Committee on an Independent Integrity Commission. The Bar understands that a select committee has been established "to inquire into the most effective and efficient model of an independent integrity commission for the ACT and that the committee make recommendations on the appropriateness of adapting models operating in other similarly-sized jurisdictions, as well as:

a) the personnel structure of the commission to ensure the appropriate carriage of workload;

b) governance and funding that delivers independence;

c) the powers available to a commission;

d) the educative functions of a commission;

e) issues regarding retrospectivity, including human rights, and the timeframes around which former actions can be assessed;

f) the relationship between any commission and existing accountability and transparency mechanisms and bodies in the ACT; and

g) any other relevant matter."

In making these submissions we acknowledge that in recent years the issue of the creation or reform of such bodies in other jurisdictions has been the subject of considerable debate and has created considerable controversy. In 2016 the Senate Select Committee on the Establishment of a National Integrity Commission sought and received a range of submissions from a range of individuals and organisation about the establishment of a National Integrity Commission. The Law Council of Australia (the LCA), of which the President of the ACT Bar Association is a Director, provided a submission to that Committee. In 2014 the NSW Bar Association provided a submission to the NSW Parliamentary Committee on the ICAC providing a range of proposals for change to the NSW Independent Commission against Corruption (ICAC) and how charges arising from an ICAC

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investigation should be dealt with. Otherwise, as the Committee is well aware, there are a significant number of recent reviews of anti-corruption bodies in many states that provide useful guidance of the operation of those bodies.

As a matter of principle the Bar strongly favours the creation of an independent anti-corruption body for the ACT which approximates the models adopted in NSW and Victoria. It is the view of the Bar that the appropriate course is to address the model first. The size of our jurisdiction should not in the first instance dictate the model for such a body. Given that Commonwealth agencies (including the AFP) will fall outside the scope of any body established and given the relative simplicity of the law enforcement field in the ACT the complexity of the task facing any body that is established in the ACT is likely to be less. There is something to be said for adopting models that have similarity to these bigger jurisdictions given they are likely to serve ultimately as models for a national anti-corruption strategy.

The Bar favours the creation of a model that has the following features.

Adequate Statutory and Financial Basis

The body created must be given a proper statutory basis that spells out its coercive powers and which gives it independence (subject to supervision by a Committee of he Assembly established for that purpose). The models created by the *Independent Commission Against Corruption Act 1988* ("the NSW Act") and the *Independent Broad-based Anti-corruption Commission Act 2011* ("the Victorian Act") provide a starting point for an ACT approach. Having an independent inspectorate to review the exercise of the Commissioner's powers may be too burdensome and expensive in the ACT. The South Australian approach of having the Attorney-General appoint someone (there yearly) to conduct a review of the activities of the Commissioner might be provide a middle ground (with the review taking place perhaps every two years). As the LCA noted, the *Cuneen* decision[1] highlights the importance of strong oversight mechanisms to ensure that any body created in the ACT does not operate beyond its jurisdiction.

A funding arrangement must be established that gives that body the capacity to discharge its functions as an independent body without having to go cap in hand to the government for each investigation that it undertakes. Resources must be sufficient to give the body the critical mass to provide reports on systemic issues rather than simply being a passive complaint processing body.

The flow on resource implications for other bodies (including the DPP) must also be given consideration. Any cases referred to the DPP are likely to be complex and the DPP must be resourced to deal effectively with such prosecutions.

Thresholds for Investigations

The statutory thresholds that apply to the beginning of investigations should not operate to place unreasonable limitations on the range of issues that can be investigated. As the LCA noted, the Victorian experience was that the Independent Broad-based Anti-Corruption Commission was unduly constrained by the high legal threshold that was imposed before it could begin an investigation. The body created in the ACT should have the power to investigate corrupt conduct and to bring the state of mind required to justify an investigation in line with formulations adopted elsewhere in the criminal law for the exercising of coercive powers; that is, an investigation can commence when there is a "reasonable suspicion" of corrupt conduct.

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[1] *ICAC v Cuneen & Ors [2015] HCA 14*

As to what constitutes "corrupt conduct" the Committee is referred to the discussion of this issue in the report of the *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption (July 2015)(NSW)*[2]. The Bar is of the view that the definition of "corrupt conduct" must place a focus on conduct that impairs or could impair public confidence in public administration. The particulars of what that might include could be added without limiting the generality of the conduct that is otherwise captured.

The powers given to the Commission must be sufficient to enable it to test the information that it is provided and to allow dismissal of complaints or decisions to be made as to referrals to other bodies (for example, the Ombudsman or the AFP) at an early stage.

The Structure of the Commission

The Commission should have a single full time head appointed for a set term and who cannot be renewed in that position. The Bar is not attracted to the idea recently adopted in NSW of having multiple Commissioners. The structure is cumbersome and unnecessary.

Appointments to the Commissioner position or to senior management positions should not be permitted from the ranks of existing ACT public servants or who have been public servants in the ACT for a period of 10 years previously. It is noted in that context that the Tasmanian Government has recently announced the appointment of a former senior Tasmanian public servant as the CEO of its integrity Commission. As a matter of principle such an approach is undesirable.

It is the Bar's view that the Commissioners should have legal qualifications.

The Commission needs sufficient staff to undertake something more than a secretariat function. Given that the AFP is a Commonwealth agency it is assumed that will be beyond the powers of the Commission to investigate. If that is the case, it may be desirable to structure the governing legislation to permit AFP resources to be co-opted to undertake investigative functions by delegation from the Commissioner. [3] However, other bodies or agencies should not have a place in the administrative structure of the Commission.

Protection of Human Rights

In a jurisdiction where the Human Rights Act (2004)(ACT) has application restraint needs to be applied in respect of how fundamental rights (such as the privilege against self incrimination) are to be modified. Careful consideration needs to be paid to a number of issues.

(i) Public Hearings

Some jurisdictions have no public hearings. Others do. It is recognised that the holding of public hearings can "trash" reputations easily. The holding of public inquiries has in some instances proved controversial and have, in some instances, become somewhat theatrical in nature. The Bar favours

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[2] *Independent Panel – Review of the Jurisdcition of he Independent Commisison Against ClOrruption Report 30 July 2015.*

[3] *In 2014 the Tasmanian Government made a submission to Joint Standing Committee of the Tasmanian Legislative Assembly calling for the virtual abolition of Tasmanian Integrity Commission. The Bar disagrees with the effect of the submission made and highlights how an effective integrity commission can create political unease. The submission is useful only to the extent that it analyses the staffing and cost structure of the Commission in what is a comparable jurisdiction.*

an approach that assumes that the hearing will take in private but allows public hearings to be conducted based on a public interest – private right discretion. A public hearing can be conducted when ultimately it is in the public interest to do so. For example, where systemic issues arise, the balance may weigh in favour of public hearings. The content of what the "public interest" is must in our view be given specific content while in the end leaving the resolution of the matter in the hands of the Commissioner. Generally this is the approach in most jurisdictions. For example, in smaller jurisdictions see section 139 of the *Corruption, Crime and Misconduct Act* 2013 (WA) (assumes that a hearing will not be in public unless the benefits of public exposure and awareness outweigh the potential for prejudice or privacy infringements). Similar provision is made in Queensland : section 177 of the *Crime and Corruption Act 2011 (Qld)*.

(ii) Safeguarding Traditional Protections

The coercive powers that are available to some anti-corruption bodies are sometimes very widely drawn. They can involve the capacity for such bodies to override rights such as the the privilege against self-incrimination and the right to a fair hearing when, for example, disclosure is made in advance of what the evidence is.

As the LCA noted it is important to place reasonable limits on the circumstances in which such powers can be exercised. To take one example, some jurisdictions (Victoria is one) require (subject to exceptions) that when witnesses are summonsed that they be given notice of the subject matter of the questions they will be asked. Another example might be that warrants (an important protection against arbitrary invasion of one's home or work) that are issued for a Commission investigation are issued by Courts rather than the Commision itself.

The over-riding of traditional rights may also be important in the consideration of whether hearings take place in private or in public.

Gathering Evidence and Prosecutions

It has been a concern of the LCA and Bars in other jurisdictions that legislative frameworks be put in place that will regulate the manner in which evidence is gathered and shared with other agencies so as to improve the prospects of that material being used in subsequent prosecutions. Admissibility in subsequent proceedings should inform the process of evidence gathering to a significant degree. For example, if powers of compulsion are used, then that may affect issues of admissibility in later proceedings. The NSW Bar Association was particularly concerned with this issue in the submission previously referred to and which is attached. This concern should also extend to allowing parties to present exculpatory material and to oblige the Commission to make such material available if it is known to it.

There is also considerable utility in ensuring that the concepts of corrupt conduct adopted in a foundational Act should be reflected in the terms of offences under the *Criminal Code 2002 (ACT)*.

Conclusions

The Bar joins the LCA in saying that it "supports effective and transparent legal and institutional measures aimed at preventing, investigating and addressing corruption at all levels of government and across various sectors ... corruption is a major obstacle to democracy and the rule of law." The enactment of legislation in the ACT is called for to address corruption issues in the ACT and to address the need for a national approach to anti-corruption measures.

While the AFP is empowered to investigate corruption in the ACT there is a perception that "politics" can make them reluctant to do so lest it appear to be taking a step into the political field.

Parliamentary Committees around Australia have successfully called for the introduction of anti-corruption bodies. The ACT is now one of the few jurisdictions at the state and territory level not to have some form of integrity commission with investigative powers. The Bar strongly supports the ACT Assembly filling that void.

The Bar would welcome the opportunity to comment on the specifics of any model that is proposed.

Yours faithfully

Ken Archer
President
ACT Bar Association