

INQUIRY INTO THE ESTABLISHMENT OF AN INTEGRITY COMMISSION FOR THE ACT

SELECT COMMITTEE ON AN INDEPENDENT INTEGRITY COMMISSION 2018

OCTOBER 2018

REPORT

THE COMMITTEE

COMMITTEE MEMBERSHIP

Mr Shane Rattenbury MLA (Chair)

Ms Elizabeth Lee MLA (Deputy Chair)

Ms Bec Cody MLA

Ms Vicki Dunne MLA

Mr Chris Steel MLA

SECRETARIAT

Mr Hamish Finlay Secretary

Ms Lydia Chung Administrative Support

Mr Danton Leary Researcher

CONTACT INFORMATION

Telephone 02 6205 0129

Post GPO Box 1020, CANBERRA ACT 2601

Email committees@parliament.act.gov.au

Website www.parliament.act.gov.au

RESOLUTION OF APPOINTMENT

At its meeting on Wednesday, 6 June 2018, the Assembly passed the following resolution:

"That:

(1) a select committee be established to further inquire into the establishment of an integrity commission for the ACT, through examination of a draft Government bill and the Anti-corruption and Integrity Commission Bill 2018, and other related matters, with consideration of:

(a) the Select Committee on an Independent Integrity Commission's report released in October 2017; and

(b) human rights requirements under the Human Rights Act 2004;

(2) the select committee shall consist of the same Members of the previous select committee inquiring into an Independent Integrity Commission, unless a Member is unavailable, consisting of:

a) two Members to be nominated by the Government;

(b) two Members to be nominated by the Opposition;

(c) one Member to be nominated by the Crossbench; and

(d) the chair shall be a Crossbench Member;

(3) the select committee be provided with necessary staff, facilities and resources;

(4) the select committee is to report by 31 October 2018;

(5) if the Assembly is not sitting when the committee has completed its inquiry, the committee may send its report to the Speaker or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publishing and circulation;

(6) the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders; and

(7) nominations for membership of the committee be notified in writing to the Speaker within two hours following conclusion of the debate on the matter."

ACRONYMS

| | |
|-------|---|
| ACTPS | Australian Capital Territory Public Service |
| CPSU | Community and Public Sector Union |
| IBAC | Independent Broad-based Anti-Corruption Commission (Victoria) |
| ICAC | Independent Commission Against Corruption (NSW) |
| MLA | Member of the Legislative Assembly |
| NSW | New South Wales |
| PID | Public Interest Disclosure |
| PSM | Public Sector Management |
| SES | Senior Executive Service |

TABLE OF CONTENTS

| | |
|--|------------|
| THE COMMITTEE | I |
| Committee Membership..... | i |
| Secretariat | i |
| Contact Information | i |
| Resolution of appointment..... | ii |
| ACRONYMS | III |
| RECOMMENDATIONS | VII |
| 1 INTRODUCTION AND CONDUCT OF THE INQUIRY | 1 |
| Background..... | 1 |
| The <i>Anti-Corruption and Integrity Commission Bill 2018</i> and Inquiry Referral | 3 |
| ACT Government’s <i>Integrity Commission Bill 2018</i> Exposure Draft | 5 |
| Conduct of the Inquiry | 8 |
| Structure of the Committee’s Report..... | 8 |
| Acknowledgements | 9 |
| 2 LEGISLATION AND PROCESS | 11 |
| Bill or Exposure Draft..... | 11 |
| Commencement | 13 |
| Definitions | 14 |
| 3 THE COMMISSIONER AND THE COMMISSION | 17 |
| Appointment of Commissioner | 17 |
| Commission staff | 22 |
| Role of the Speaker..... | 24 |
| 4 ADDRESSING CORRUPTION | 27 |
| Definition of corrupt conduct | 27 |
| Obligation to report corrupt conduct..... | 36 |
| Complaints and referrals..... | 40 |
| Legislative Assembly Commissioner for Standards..... | 42 |
| 5 PRIVILEGE | 47 |
| Parliamentary privilege..... | 47 |
| Other forms of privilege..... | 50 |
| 6 INVESTIGATIONS AND EXAMINATIONS | 53 |

| | |
|--|-----------|
| Public Examinations..... | 53 |
| Investigation powers, warrants | 56 |
| Obstruction of the Commission and Inspector..... | 62 |
| 7 OVERSIGHT OF THE COMMISSION | 65 |
| Functions and Powers of the Inspector..... | 65 |
| Eligibility to be the Inspector | 67 |
| The Assembly..... | 69 |
| 8 THE INTEGRITY FRAMEWORK | 71 |
| Cooperation between agencies..... | 71 |
| Public interest disclosure act | 72 |
| Education..... | 73 |
| 9 CONCLUSION | 75 |
| APPENDIX A - WITNESSES..... | 77 |
| 21 September 2018..... | 77 |
| 24 September 2018..... | 77 |
| 28 September 2018..... | 77 |
| APPENDIX B - SUBMISSIONS | 79 |

RECOMMENDATIONS

RECOMMENDATION 1

- 2.7** The Committee recommends that the ACT Government table a bill based on the Integrity Commission Bill 2018 Exposure Draft, incorporating amendments recommended in this report, and that the Assembly debate that bill.

RECOMMENDATION 2

- 2.8** The Committee recommends that the Assembly not proceed with the Anti-corruption and Integrity Commission Bill 2018.

RECOMMENDATION 3

- 2.11** The Committee recommends the following process could enable the passage of the legislation within the current sitting pattern:
- The ACT Government respond to this report by instructing the Parliamentary Counsel Office to amend the Exposure Draft to give effect to any recommendations in this report with which the ACT Government agrees, creating a draft bill.
 - The ACT Government further instruct the Parliamentary Counsel Office to prepare, but not incorporate into the draft bill, draft amendments to give effect to any recommendations in this report with which the ACT Government does not agree.
 - Both the draft bill and draft amendments be made available to all members, and the legal adviser of the Standing Committee on Justice and Community Safety (Legislative Scrutiny role), by close of business 16 November 2018.
 - During the week beginning 19 November 2018 members representing each party, their advisers, parliamentary drafters and any other officials that may be of assistance meet to discuss and refine the draft bill.
 - On 27 November 2018 the Government table a draft bill, incorporating any amendments agreed during meetings the proceeding week.
 - The Assembly suspend Standing Orders in order to debate the bill during that week.

RECOMMENDATION 4

- 2.16** The Committee recommends that commencement of the legislation be staggered to allow for the appointment of a Commissioner and Commission prior to the receipt of complaints.

RECOMMENDATION 5

- 2.17** The Committee recommends that s2(2) of the Exposure Draft be reviewed to confirm whether delayed commencement provisions should be linked to s6.

RECOMMENDATION 6

- 2.20** The Committee recommends that all definitions be included in the legislation, not defined in regulation.

RECOMMENDATION 7

- 3.8** The Committee recommends that the criteria for eligibility for Commissioner and Inspector allow for the appointment to the role of a former judge, as listed in s26(1) of the Exposure Draft, or an Australian legal practitioner of not less than 10 years standing.

RECOMMENDATION 8

- 3.9** The majority of the Committee recommends that the criteria for eligibility for Commissioner prohibit the appointment of a former member of the Legislative Assembly to the role.

RECOMMENDATION 9

- 3.12** The Committee recommends that the terms of appointment for a Commissioner and CEO of the Commission be of different lengths to ensure continuity of operations.

RECOMMENDATION 10

- 3.15** The Committee recommends that the provisions relating to the Commissioner's conflicts of interest in s29 of the Exposure Draft be reviewed to consider improved drafting, including drawing on s102 of the Bill.

RECOMMENDATION 11

- 3.20** The Committee recommends that the maximum term of appointment of an acting Commissioner be defined in the legislation as six months and that any reappointment to a further six month term be subject to consultation with the relevant Assembly committee.

RECOMMENDATION 12

- 3.21** The Committee recommends that the legislation be amended to include the explanatory note to s97 of the Bill regarding acting appointments.

RECOMMENDATION 11

- 3.24** The Committee recommends that bankruptcy and insolvency be grounds to suspend a Commissioner.

RECOMMENDATION 14

- 3.27** The Committee recommends that the ACT Government consider whether failure by the Commissioner to disclose conflict of interest matters would be considered "misbehaviour" under s33 of the Exposure Draft, as that term is generally understood, or whether the more specific provisions on this matter in s105 of the Bill should be adopted.

RECOMMENDATION 12

- 3.30** The Committee recommends that the ACT Government consider the question of how a CEO of the Commission could be suspended and, if necessary, insert suspension provisions in the legislation.

RECOMMENDATION 13

- 3.37 The majority of the Committee recommends that the legislation require that staff of the Commission not have been an ACT public servant in the last 5 years.

RECOMMENDATION 14

- 3.38 The Committee recommends that the legislation require the Commission to develop and publish guidelines for personal interest disclosures requested under s48 of the Exposure Draft.

RECOMMENDATION 15

- 3.41 The Committee recommends that the legislation authorise the Speaker to seek administrative support and advice in discharging the Speaker's statutory role under the legislation, in a similar way as s37B of the *Auditor-General's Act 1996* and s37A of the *Ombudsman Act 1989*.

RECOMMENDATION 16

- 3.42 The Committee recommends that the Standing Committee on Administration and Procedure examine the level and manner of support to the Speaker in performing her statutory roles under Officer of the Assembly legislation.

RECOMMENDATION 17

- 4.11 The Committee recommends that the legislation be examined to ensure that it incorporates the full extent of the NSW definition of corrupt conduct, as reflected in the Bill, but maintain the focus on "serious corrupt conduct" and "systemic corrupt conduct".

RECOMMENDATION 18

- 4.15 The Committee recommends that the ACT Government consider whether the legislation should explicitly state that the Commission has no jurisdiction prior to 1989.

RECOMMENDATION 19

- 4.25 The Committee recommends that the legislation be amended to make previous investigation by another body a consideration in the Commissioner's determination if an investigation is in the public interest and not a bar to investigation by the Commission.

RECOMMENDATION 20

- 4.28 The Committee recommends that the ACT Government consider whether the definition of public authority in the legislation should be amended to cover persons that do not have a contractual relationship with government but are licenced by government to provide certain services.

RECOMMENDATION 21

- 4.37 The majority of the Committee recommends that the definition of public official include members of the judiciary and judicial officers.

RECOMMENDATION 22

- 4.51 The Committee recommends that the legislation be amended so that Senior Executive Service officers are included in mandatory corruption notification provisions in s60 of the Exposure Draft.

RECOMMENDATION 23

4.52 The Committee recommends that provisions on mandatory corruption notifications be amended to make it clear that the following individuals are not subject to those provisions in performance of their duties but are subject to those provisions regarding possible serious or systemic corrupt conduct within their own organisations:

- The Auditor-General;
- The Ombudsman;
- The Electoral Commissioner;
- The Human Rights Commissioner; and
- The Clerk of the Legislative Assembly.

RECOMMENDATION 24

4.53 The Committee recommends that the Speaker not be exempt from mandatory corruption notification provisions.

RECOMMENDATION 25

4.54 The Committee recommends that provisions on mandatory corruption notifications be amended to remove reference to a member of staff of an MLA.

RECOMMENDATION 26

4.60 The Committee recommends that the legislation include an offence of failing to make a mandatory corruption notification

RECOMMENDATION 27

4.61 The Committee recommends that the Commission provide comprehensive training and education material to anyone subject to mandatory corruption notification requirements.

RECOMMENDATION 28

4.68 The Committee recommends that s56(1) of the Exposure Draft be redrafted by removing “and” between the items on the list of ways in which a corruption complaint may be made.

RECOMMENDATION 29

4.73 The Committee recommends that the legislation be amended so that a complainant loses their absolute privilege from defamation should they publicly disclose the contents of a complaint prior to the Commission making it public.

RECOMMENDATION 30

4.79 The Committee recommends that the Standing Committee on Administration and Procedure develop amendments to continuing resolution 5AA to permit the Legislative Assembly Commissioner for Standards to refer matters to the Commission and to receive and act on referrals from the Commission.

RECOMMENDATION 3 1

4.80 The Committee recommends that the legislation be amended by deleting s57(4)(d) to remove the Legislative Assembly Commissioner for Standards from the list.

RECOMMENDATION 3 2

4.81 The Committee recommends that the legislation be amended by adding the Legislative Assembly Commissioner for Standards, the Speaker and Deputy Speaker to the list of entities in s104(2) from which the Commissioner may not ask for written reports

RECOMMENDATION 3 3

4.84 The Committee recommends that the legislation be reviewed to ensure that s103(1)(a) of the Exposure Draft, which prevents the Commission from referring a corruption report that it does not have the power to investigate, does not obstruct effective cooperation between integrity bodies.

RECOMMENDATION 3 4

5.6 The Committee recommends that the legislation state that where a matter of parliamentary privilege arises in the course of the exercise of the Commission's powers, it shall be dealt with by the Assembly.

RECOMMENDATION 3 5

5.7 The Committee recommends that the ACT Government obtain and publish a legal analysis on the impact s270(a)(iv) of the Exposure Draft, and similar provisions in the *Public Interest Disclosure Act 2012*, has on the Assembly's rights as regards s24(3) of the *Australian Capital Territory (Self Government) Act 1988*.

RECOMMENDATION 3 6

5.10 The Committee recommends that the ACT Government explore whether specific provision needs to be made in the legislation to permit the Commissioner to make use of Members' declarations of interest.

RECOMMENDATION 3 7

5.16 The Committee recommends that the Standing Committee on Administration and Procedure consider the arrangements necessary for an independent process to advise on claims of parliamentary privilege that arise during Commission investigations and present a proposal to the Assembly.

RECOMMENDATION 3 8

6.15 The Committee recommends that the legislation require the Commissioner to issue guidelines about the Commission's policies and procedures, and that the ACT Government consider whether the guidelines should be a notifiable instrument.

RECOMMENDATION 3 9

6.20 The majority of the Committee recommends that the legislation prohibit the use of summons in preliminary inquiries.

RECOMMENDATION 40

- 6.27 The Committee recommends that the ACT Government re-examine the timeframes in the legislation under which persons arrested under an arrest warrant must be brought before the Commission to ensure consistency with the language and timeframes used in other relevant pieces of ACT legislation.

RECOMMENDATION 41

- 6.28 The Committee recommends that s156(3)(e) of the Exposure Draft be redrafted by deleting the phrase “if the magistrate has contacted the person” and making s156(3)(e)(i) and s156(3)(e)(ii) into s156(3)(f) and s156(3)(g) respectively.

RECOMMENDATION 42

- 6.36 The Committee recommends that s186 of the Exposure Draft be amended to give the Commission the discretion to withhold a proposed investigation report from a relevant entity if there are reasonable grounds to believe that the sharing of the proposed investigation report could prejudice a prosecutorial or serious disciplinary action.

RECOMMENDATION 43

- 6.49 The Committee recommends that the legislation be amended to include a general offence of obstructing the Commissioner, Inspector, their staff and witnesses, similar to Part 9 of New South Wales *Independent Commission Against Corruption Act 1988*.

RECOMMENDATION 44

- 7.5 The Committee recommends that the ACT Government amend the Exposure Draft to contain a clear statement of the Inspector’s powers in a similar manner as s57 of New South Wales’ *Independent Commission Against Corruption Act 1988*.

RECOMMENDATION 45

- 7.8 The Committee recommends that the ACT Government remove any provisions from the legislation that require automatic reporting of the Commission’s use of its powers to the Inspector, including sections 79, 87, 139, 144, 155, 158, 166 and 192.

RECOMMENDATION 46

- 7.13 The Committee recommends that the legislation omit reference to any requirement that inspectorate staff be employed by the Territory or under Territory law to enable a Commonwealth agency to be appointed as Inspector if so chosen.

RECOMMENDATION 47

- 7.14 The Committee recommends that the legislation be amended so that any exercise by the Speaker of the power under s236(2) to make arrangements for another person to exercise the functions of the Inspector be subject to the consultation and Assembly resolution requirements of s222(2)(a) and s222(3)(b).

RECOMMENDATION 48

- 7.17** The Committee recommends that the legislation be amended by deleting s260 of the Exposure Draft, removing the power of the Inspector to recommend that an acting Commissioner be appointed.

RECOMMENDATION 49

- 7.20** The Committee recommends that the Commissioner be required to maintain a register of conflicts of interest and any steps taken to manage them within the Commission and that the register be available to the Inspector.

RECOMMENDATION 50

- 7.21** The Committee recommends that the Inspector report to the relevant Assembly committee on the extent to which the Commission is managing conflicts of interest.

RECOMMENDATION 51

- 7.25** The Committee recommends that the Assembly establish a dedicated committee with oversight of the Commission.

RECOMMENDATION 52

- 7.26** The Committee recommends that the legislation be amended to replace references to the “presiding member of the relevant Assembly committee” with “the relevant Assembly committee”.

RECOMMENDATION 53

- 8.5** The Committee recommends that the legislation be amended to remove reference in s23(1)(f) to the Commission providing leadership to the Legislative Assembly.

RECOMMENDATION 54

- 8.15** The Committee recommends that the ACT Government establish a comprehensive review of the *Public Interest Disclosure Act 2012* as soon as is possible with the aim of having changes implemented by 2020.

1 INTRODUCTION AND CONDUCT OF THE INQUIRY

BACKGROUND

- 1.1 At the 2016 ACT General Election, all of the parties represented in the Legislative Assembly committed to the establishment of an independent integrity commission for the ACT. In pursuit of that commitment, on 15 December 2016, the Legislative Assembly established the Select Committee on an Independent Integrity Commission to inquire and report on the issue.¹
- 1.2 That Select Committee was tasked ‘to inquire into the most effective model of an independent integrity commission for the ACT’ and ‘make recommendations on the appropriateness of adapting models operating in other similarly-sized jurisdictions’. That Committee’s Terms of Reference also required that Committee to consider the commission’s personnel structure, governance and funding, powers, educative functions, issues regarding retrospectivity, and the relationship between the commission and existing accountability and transparency mechanisms in the Territory.²
- 1.3 On 27 March 2017, that Committee released an Issues Paper—*Australian Public Sector Integrity Frameworks*—to ‘assist individuals and organisations to prepare submissions to its inquiry’. The Issues Paper provided a comparison of legislative frameworks in place across Australian jurisdictions ‘that presently have a designated integrity body or commission’, analysed associated issues, and outlined the features of ‘a Model Commission’ based on relevant academic literature.³
- 1.4 After receiving submissions and holding public hearings, that Select Committee tabled its report—*Inquiry into an Independent Integrity Commission*—to the Legislative Assembly on 31 October 2017.
- 1.5 The Report made 79 unanimous recommendations, including that the ACT Government ‘establish a standing ACT independent integrity body to investigate corruption in public administration and strengthen public confidence in government integrity’.⁴

¹ *Inquiry into an Independent Integrity Commission for the ACT*, Select Committee on an Independent Integrity Commission, October 2017, p. ix.

² *Inquiry into an Independent Integrity Commission for the ACT*, Select Committee on an Independent Integrity Commission, October 2017, p. ii.

³ *Inquiry into an Independent Integrity Commission for the ACT*, Select Committee on an Independent Integrity Commission, October 2017, pp. 1-3.

⁴ *Inquiry into an Independent Integrity Commission for the ACT*, Select Committee on an Independent Integrity Commission, October 2017, Select Committee on an Independent Integrity Commission 2018, Recommendation 1, p. xiii.

1.6 The Report's key recommendations were that the ACT independent integrity commission should:

- cover all public officials, and parties delivering contracted work or services on behalf of government (Recommendation 10);
- have the following functions: (a) investigation, referral and reporting; (b) corruption prevention (including research and risk management); and (c) public education (Recommendation 5);
- have oversight over policing officers funded to deliver services by and to the ACT taxpayer and community (Recommendation 12);
- have oversight over Members of the Legislative Assembly (MLAs), MLA staff, and Judicial Officers (Recommendation 14);
- have a definition of 'corrupt conduct' based on Part 3 of the NSW *Independent Commission Against Corruption Act 1988* (Recommendation 17);
- be visible, accessible and a contact point for: (a) citizens and public servants to make complaints/and report corruption concerns; (b) referrals from within government (ACT Public Service); (c) referrals from other integrity stakeholders/bodies; and (d) referrals from other designated stakeholders (Recommendation 23);
- have the power to make findings of fact that corruption has occurred and that such a finding is not to be taken as a finding of guilt (Recommendation 38);
- be empowered to refer suspected instances of criminality to appropriate authorities (Recommendation 45);
- not be limited as to timeframes around which former actions can be assessed, but have an operational focus that is largely prospective and focused on current matters (Recommendation 52);
- have the power to hold public examinations. The decision on whether to hold public or private examinations should be informed by a public interest test (Recommendation 54); and
- be an Officer of the Assembly (Recommendation 58).⁵

⁵ *Inquiry into an Independent Integrity Commission for the ACT*, Select Committee on an Independent Integrity Commission, October 2017, p. x.

- 1.7 On 20 March 2018, the ACT Government responded to that Select Committee’s Report. The response noted that:

The ACT Government is committed to establishing an Independent Integrity Commission which is broadly structured on those operating in similarly sized jurisdictions. The Select Committee report and recommendations will inform the establishment of a Commission.⁶

- 1.8 Of that Committee’s 79 recommendations, the Government agreed or agreed in part to 25 recommendations, agreed in principle to 11 recommendations, and noted 43 recommendations.⁷

- 1.9 The Government agreed, in principle, that the establishment of the independent integrity commission be finalised by the end of 2018, noting that ‘the establishment of an ACT integrity body and developing its enabling legislation requires careful consideration’ and agreed that draft legislation be referred to a Legislative Assembly committee for inquiry and report.⁸

THE *ANTI-CORRUPTION AND INTEGRITY COMMISSION BILL 2018* AND INQUIRY REFERRAL

- 1.10 On 6 June 2018, Leader of the Opposition, Mr Alistair Coe MLA, tabled a private member’s bill to the Legislative Assembly—the *Anti-Corruption and Integrity Commission Bill 2018*.

- 1.11 In his Explanatory Statement, Mr Coe explained that ‘the purpose of the Bill is to establish an ACT-specific integrity body, the Anti-Corruption Integrity Commission’. Mr Coe explained that Bill’s main object was to:

...promote the integrity and accountability of public administration. This is achieved through establishing the Commission and conferring on the Commission special powers to inquire into allegations. The objects include to investigate, expose and prevent corruption involving public administration; to educate public entities and the public at large about corruption; to foster public confidence in combatting corruption and in promoting integrity and good repute; and to provide leadership and coordination for the integrity framework within public administration.⁹

⁶ ACT Government, ‘Government Response to Select Committee’s Report Inquiry into an Independent Integrity Commission’, p. 2.

⁷ ACT Government, ‘Government Response to Select Committee’s Report Inquiry into an Independent Integrity Commission’, p. 2.

⁸ ACT Government, ‘Government Response to Select Committee’s Report Inquiry into an Independent Integrity Commission’, p. 6.

⁹ Leader of the Opposition and Shadow Treasurer, Mr Alistair Coe MLA, ‘Anti-Corruption and Integrity Commission Bill 2018: Explanatory Statement’, p. 3.

- 1.12 The Anti-Corruption and Integrity Commission Bill 2018 establishes the function of the Commission as, inter alia:
- a) investigating—
 - i. corruption issues; and
 - ii. matters referred to the commission by the Legislative Assembly; and
 - iii. matters involving serious or systemic corruption; and
 - b) referring suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action; and
 - c) preventing corruption, including by—
 - i. providing education about corrupt practices; and
 - ii. researching corrupt practices; and
 - iii. mitigating the risk of corruption; and
 - d) publishing information about investigations conducted by the commission, including lessons learned; and
 - e) fostering public confidence in, and giving leadership to, the parliament and public sector.¹⁰
- 1.13 Mr Coe further noted that the *Anti-Corruption and Integrity Commission Bill 2018* gives effect to all of the Select Committee’s recommendation that can be met through legislation—76 of the 79 recommendations, and that ‘by incorporating each recommendation as if they were agreed to, the Bill ensures this model contained in the Bill has a high likelihood to be the most effective and efficient for the ACT’.¹¹
- 1.14 On the same day as the tabling of the *Anti-Corruption and Integrity Commission Bill 2018*, the Legislative Assembly resolved to establish a new select committee—the Select Committee on an Independent Integrity Commission 2018.
- 1.15 The Select Committee’s Terms of Reference¹², as stated in the Committee’s Resolution of Appointment, tasked the Committee to:

¹⁰ *Anti-Corruption and Integrity Commission Bill 2018*, s. 93.

¹¹ Leader of the Opposition and Shadow Treasurer, Mr Alistair Coe MLA, ‘Anti-Corruption and Integrity Commission Bill 2018: Explanatory Statement’, pp. 2-3.

¹² The complete Terms of Reference are at p. ii.

1) further inquire into the establishment of an integrity commission for the ACT, through examination of a draft Government bill and the Anti-Corruption and Integrity Commission Bill 2018, and other related matters, with consideration of:

- (a) the Select Committee on an Independent Integrity Commission's report released in October 2017; and
- (b) human rights requirements under the *Human Rights Act 2004*.¹³

1.16 The Select Committee's Terms of Reference further stipulated that the Committee consist of two Government members, two opposition members, and one crossbench member, with the crossbench member to act as the Chair. The Terms of Reference also required the Committee to report by 31 October 2018.¹⁴

ACT GOVERNMENT'S *INTEGRITY COMMISSION BILL 2018* EXPOSURE DRAFT

1.17 On 26 July 2018, the ACT Government released its Exposure Draft for the *Integrity Commission Bill 2018* (the Exposure Draft).¹⁵ The objects of the Exposure Draft include:

- (a) providing for the identification, investigation and exposure of corrupt conduct; and
- (b) providing for the commission to prioritise the investigation and exposure of serious corrupt conduct and systemic corrupt conduct; and
- (c) achieving a balance between the public interest in exposing corruption in public administration and the public interest in avoiding undue prejudice to a person's reputation; and
- (d) assisting in the prevention of corrupt conduct; and
- (e) cooperating with other integrity bodies; and
- (f) educating public officials and the community about the detrimental effects of corrupt conduct on public administration and the community and the ways in which corrupt conduct can be prevented; and

¹³ Select Committee on an Independent Integrity Commission 2018, 'Inquiry into the establishment of an Integrity Commission for the ACT', Terms of Reference.

¹⁴ Select Committee on an Independent Integrity Commission 2018, 'Inquiry into the establishment of an Integrity Commission for the ACT', Terms of Reference.

¹⁵ This original Exposure Draft was replaced on 28 August 2018 'to correct a typographical error in s. 104(2) and s. 105(3)'. See: ACT Legislation Register, *Integrity Commission Bill 2018*.

(g) assisting in improving the capacity of the public sector to prevent corrupt conduct.¹⁶

1.18 The Exposure Draft seeks to achieve these objects through the establishment of an ACT Integrity Commission consisting of a Commissioner who is an independent officer of the Legislative Assembly.¹⁷

1.19 The Exposure Draft explains that the functions of the Integrity Commission are to:

- (a) investigate conduct that is alleged to be corrupt;
- (b) refer suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action;
- (c) prevent corruption, including by—
 - i. researching corrupt practices;
 - ii. mitigating the risks of corruption;
- (d) publish information about investigations conducted by the commission, including lessons learned;
- (e) provide education programs about the operation of this Act and the commission, including providing advice, training and education services to:—
 - I. the Legislative Assembly and the public sector to increase capacity to prevent corrupt conduct; and
 - II. the community about the detrimental effects of corruption on public administration and ways in which to assist in preventing corrupt conduct;
- (f) foster public confidence in, and to give leadership to, the Legislative Assembly and public sector.¹⁸

1.20 In the Government's Explanatory Statement on the Exposure Draft, the Chief Minister, Mr Andrew Barr MLA, explained that the Exposure Draft:

ensures the functions of the body are delineated and clearly defined and cognisant of existing independent oversight bodies. The Integrity Commission will focus mainly on prospective and current matters, with some limited ability to review retrospective or previous matters, subject to certain requirements.¹⁹

¹⁶ *Integrity Commission Bill 2018*, Exposure Draft, s. 6.

¹⁷ *Integrity Commission Bill 2018*, Exposure Draft, ss. 19, 20, 21.

¹⁸ *Integrity Commission Bill 2018*, Exposure Draft, s. 23.

¹⁹ ACT Government, 'Integrity Commission Bill 2018 (Exposure Draft): Explanatory Statement', p. 1.

1.21 Additionally, Chief Minister Barr, further explained that:

The new Integrity Commission complements the ACT's existing strong structure of public sector oversight, ensuring a highly transparent and professional territory administration. These existing bodies include as ACT Public Sector Standards Commissioner, ACT Legislative Assembly Commissioner for Standards, ACT Legislative Assembly Ethics and Integrity Advisor, ACT Human Rights Commission, the ACT Auditor-General and ACT Ombudsman as well as staff Codes of Conduct and Ministerial Standards.²⁰

1.22 Commenting on the Human Rights implications of the Exposure Draft, the Chief Minister noted that it 'achieves an important purpose overall, as it supports Government's commitment to transparency and confidence in public administration within a framework where an individual's privacy and reputation are reasonably protected in accordance with community expectations'.²¹

1.23 The Exposure Draft, amongst other things, provides a definition of 'corrupt conduct' to mean 'conduct by, or involving, the person that—

- (a) adversely affects, or could adversely affect, directly or indirectly, the honest and impartial exercise of a function of a public official or public sector entity; and
- (b) could, if proved—
 - i. be an offence against a law in force in the Territory; or
 - ii. be reasonable grounds for serious disciplinary action against the person.²²

1.24 On this definition, the Chief Minister Barr noted that:

As recommended by the Select Committee, the definition of corrupt conduct in the Bill is based on Part 3 of the *NSW Independent Commission Against Corruption Act 1988*, drafted to reflect ACT legislation. The limitation on the nature of corrupt conduct that NSW uses in relation to misconduct and disciplinary issues is not replicated in the Bill. The Government is of the view that there are existing provisions and oversight mechanisms in place for dealing with misconduct of Members of the Legislative Assembly, Statutory Office Holders, ACT public sector employees and third party contractors (through contracts). Disciplinary issues will continue to be dealt with under applicable codes of conduct provisions.²³

²⁰ ACT Government, 'Integrity Commission Bill 2018 (Exposure Draft): Explanatory Statement', p. 1.

²¹ ACT Government, 'Integrity Commission Bill 2018 (Exposure Draft): Explanatory Statement', p. 5.

²² *Integrity Commission Bill 2018*, Exposure Draft, s. 9.

²³ ACT Government, 'Integrity Commission Bill 2018 (Exposure Draft): Explanatory Statement', p. 3.

CONDUCT OF THE INQUIRY

COMMITTEE COMPOSITION

- 1.25 The Committee membership was identical to that of the previous Select Committee on an Independent Integrity Committee (the original committee) apart from Mrs Guila Jones MLA, who was on leave from the Assembly, being replaced by Mrs Vicki Dunne MLA.
- 1.26 The Committee had two Cabinet Ministers within its membership, Mr Rattenbury MLA and Mr Steel MLA (who was appointed to the executive after the Committee had commenced its business.) Both members informed the Committee that they excluded themselves from any Cabinet deliberations on the matters before the Committee for the life of the Committee.

SUBMISSIONS AND PUBLIC HEARINGS

- 1.27 The Committee called for submissions for the inquiry between 31 July 2018 and 31 August 2018. The Committee also directly invited submissions from all parties who had made a submission to the previous Select Committee on an Independent Integrity Commission.
- 1.28 The Committee received a total of 15 submissions from ACT Government agencies, professional bodies and interested individuals. A complete list of submissions is at **Appendix B**.
- 1.29 The Committee held public hearings on 21, 24 and 28 September 2018. At these public hearings, the Committee heard from 13 witnesses. Details of these public hearings are at **Appendix A**. Transcripts of these hearings are available on the ACT Legislative Assembly's website.²⁴ At the public hearing of 28 September the CPSU and the Chief Minister took some questions on notice. Answers to all questions taken on notice were received by the Committee and can be viewed on the Assembly's website.²⁵

STRUCTURE OF THE COMMITTEE'S REPORT

- 1.30 This structure of this report is as follows:

Chapter 1: Introduction and conduct of the inquiry

Chapter 2: Legislation and process

Chapter 3: The Commissioner and the Commission

Chapter 4: Addressing corruption

²⁴ <http://www.hansard.act.gov.au/hansard/2017/comms/default.htm>

²⁵ https://www.parliament.act.gov.au/in-committees/select_committees/independent-integrity-commission-2018/inquire-into-the-establishment-of-an-integrity-commission-for-the-act

Chapter 5: Privilege

Chapter 6: Investigations and examinations

Chapter 7: Oversight of the Commission

Chapter 8: The integrity framework

Chapter 9: Conclusion

ACKNOWLEDGEMENTS

1.31 The Committee thanks all of those who contributed to the Inquiry by making submissions and appearing as witnesses at public hearings. The Committee acknowledges the limited timeframe contributors had to assess two pieces of proposed legislation but believes that their efforts will result in significant improvements in the final legislation.

2 LEGISLATION AND PROCESS

BILL OR EXPOSURE DRAFT

- 2.1 The Committee is examining two pieces of proposed legislation. The Committee needs to advise the Assembly on how it should proceed with those pieces of legislation.
- 2.2 Former NSW Auditor-General Mr Tony Harris told the Committee that many features of both pieces of legislation are “state of the art” and that the ACT was on the verge of putting up the best integrity legislation in the country.²⁶
- 2.3 The Assembly’s Ethics and Integrity Adviser said that as he:
- read the two bills I thought that there were a lot of good points in each of them, but I hope the committee will not regard it as a choice of one or the other. I do not think either one is just right. So I do not see it as a binary choice; I think there is probably a compromise or a scissors-and-paste job to be done.²⁷

COMMITTEE COMMENT

- 2.4 The Committee notes that the Bill and the Exposure Draft contain many similarities, with some provisions being identical and many others containing only minor differences. The Committee understands that in both cases the drafting instructions issued largely tried to give effect to the recommendations of the previous committee. Where the Bill and the Exposure Draft differ the Committee has made comparisons. On some occasions it has preferred the drafting in the Bill, in others, the Exposure Draft. In some instances it has decided that neither approach is ideal and recommends an alternative approach.
- 2.5 With two worthy pieces of work before it the Committee had to make a decision on what would be the most effective way for the Assembly to proceed. The Committee is not attracted to a process where two pieces of legislation are advanced simultaneously as that raises the potential for confusion and inadvertent effects from hurriedly drafted amendments.
- 2.6 In choosing which option to select an important consideration was that the Exposure Draft is approximately 120 pages longer than the Bill. This additional content largely reflects the results of internal consultation with various agencies of government that is not available in

²⁶ *Proof Transcript of Evidence*, 24 September 2018, p. 18.

²⁷ *Proof Transcript of Evidence*, 24 September 2018, p. 27.

drafting a private members' bill. While the Committee recommends some changes to that content the Committee believes that the bulk of the Exposure Draft's additional content has value and should be preserved. From a practical viewpoint it is easier to work from the Exposure Draft and make changes where necessary than it is to insert substantial amounts of additional content into the Bill. Accordingly the Committee recommends that the Assembly should work with the Exposure Draft not the Bill.

Recommendation 1

- 2.7 The Committee recommends that the ACT Government table a bill based on the Integrity Commission Bill 2018 Exposure Draft, incorporating amendments recommended in this report, and that the Assembly debate that bill.**

Recommendation 2

- 2.8 The Committee recommends that the Assembly not proceed with the Anti-corruption and Integrity Commission Bill 2018.**
- 2.9 The Committee acknowledges, however, that proceeding with the Exposure Draft does raise issues that advancing the Bill would not. The Chief Minister has expressed the hope that all parties in the Assembly will support passing legislation establishing an integrity commission in 2018.²⁸ Given the timing of this report, that leaves a single sitting week in November in which the Assembly could consider legislation. The Assembly will have to suspend Standing Orders if it wishes to have the Exposure Draft tabled as a bill on the first sitting day of the week and complete its consideration and pass the bill the same week.
- 2.10 Given the importance of this legislation the Committee considers that it would be highly undesirable if the first members saw of the bill, which should contain significant differences from the Exposure Draft, was upon tabling on Tuesday 27 November with the expectation that it be passed on Thursday 29 November. The Committee therefore recommends a process to address these concerns.

Recommendation 3

- 2.11 The Committee recommends the following process could enable the passage of the legislation within the current sitting pattern:**
- **The ACT Government respond to this report by instructing the Parliamentary Counsel Office to amend the Exposure Draft to give effect to any recommendations in this report with which the ACT Government agrees, creating a draft bill.**

²⁸ *Proof Transcript of Evidence*, 28 September 2018, p. 66.

- **The ACT Government further instruct the Parliamentary Counsel Office to prepare, but not incorporate into the draft bill, draft amendments to give effect to any recommendations in this report with which the ACT Government does not agree.**
- **Both the draft bill and draft amendments be made available to all members, and the legal adviser of the Standing Committee on Justice and Community Safety (Legislative Scrutiny role), by close of business 16 November 2018.**
- **During the week beginning 19 November 2018 members representing each party, their advisers, parliamentary drafters and any other officials that may be of assistance meet to discuss and refine the draft bill.**
- **On 27 November 2018 the Government table a draft bill, incorporating any amendments agreed during meetings the proceeding week.**
- **The Assembly suspend Standing Orders in order to debate the bill during that week.**

2.12 The Committee is hopeful that this process will resolve significant differences and therefore limit amendments proposed during the debate to a few areas of principle upon which members are not able to reach agreement. It notes that it is open to the Assembly to schedule an additional sitting day this year, if further time is needed to make drafting changes and conclude debate.

COMMENCEMENT

2.13 The Committee notes that the Exposure Draft has the legislation commencing upon a date fixed by written notice by the Minister, apart from certain provisions related to ACT Policing and the Australian Federal Police.²⁹ The Committee notes that the Commission will need some time to become established, with the Speaker appointing a Commissioner under the legislation and the Commissioner subsequently appointing a CEO and staff of the Commission. If the legislation comes into effect as a whole, the complaint provisions will become active long before there is anyone appointed or employed to address them.

COMMITTEE COMMENT

2.14 The Committee expects that the process of recruiting a Commissioner and establishing a Commission will begin as soon as possible after the legislation is passed. It would expect that the structural provisions of the legislation would come into effect on 1 January 2019 to facilitate this. The Committee hopes that all remaining provisions in the legislation, barring those related to the AFP, will come into effect by 1 July 2019 but acknowledges that any delays in the appointment process could make this impracticable.

²⁹ Integrity Commission Bill 2018 Exposure Draft, s 2.

2.15 The Committee notes that section 2(2) of the Exposure Draft has provisions related to the AFP coming into effect 12 months after the commencement of section 6. Section 6 concerns the objects of the Act and the Committee is unsure whether it was the drafters' intention to link commencement to that section.

Recommendation 4

2.16 **The Committee recommends that commencement of the legislation be staggered to allow for the appointment of a Commissioner and Commission prior to the receipt of complaints.**

Recommendation 5

2.17 **The Committee recommends that s2(2) of the Exposure Draft be reviewed to confirm whether delayed commencement provisions should be linked to s6.**

DEFINITIONS

2.18 The Committee notes the following submission from the ACT Law Society:

All legislative definitions should be drafted precisely in the enabling act. It is not appropriate that the legislative definitions for public official, public sector entity, head of a public sector entity, relevant entity, referral entity and principal officer of a public authority are further prescribed by regulation.³⁰

COMMITTEE COMMENT

2.19 The Committee agrees with the ACT Law Society that it would be inappropriate for a Minister's regulatory decision to place individuals or agencies inside or outside of the Integrity Commission's jurisdiction.

Recommendation 6

2.20 **The Committee recommends that all definitions be included in the legislation, not defined in regulation.**

³⁰ *Submission 15*, ACT Law Society, 28 September 2018, p. 2.

3 THE COMMISSIONER AND THE COMMISSION

APPOINTMENT OF COMMISSIONER

- 3.1 The original committee recommended that “to be qualified for appointment as Commissioner the person must be a former Judge of a Supreme Court or the Federal or High Court, or be a legal practitioner of not less than ten years standing”.³¹
- 3.2 The Bill and the Exposure Draft differ on the eligibility criteria for appointment to the role of Commissioner. Both permit the appointment of senior judicial officers but the Bill also permits the appointment of someone who has been a lawyer for 10 years. The proposed pieces of legislation also differ on the restrictions that should be imposed on the appointment of former politicians, former public servants and members of political parties to the role of Commissioner.
- 3.3 When asked about the difference between the Bill and the Exposure Draft in this area Mr Coe noted that the types of people that were eligible for the role were in high demand across the country. Broader selection criteria ensured that the pool of potential appointees was not limited to very few people.³² Regarding appointing former politicians as Commissioner Mr Coe observed:
- I think most people would think that the role of ICAC is to make sure we do not have dodgy politicians. Regardless of whether that is actually true or whether that is actually the perception in the community, there is a real risk that, by having an ex-politician being the watchdog of politicians, this is not going to represent the best of an ICAC. To that end, I think you can avoid the whole problem and avoid the pressure that a government or political party might face internally by just not having that as an option on the table.³³
- 3.4 Other witnesses noted the various opportunities open to senior former judicial officers and the potential difficulties in attracting such people to roles in Canberra.³⁴ The ACT Bar Association said in its submission that the eligibility criteria in the Exposure Draft will mean that in practice “the field of eligible will be very small, older and generally male”.³⁵ Mr Tony Harris suggested that the Bill and the Exposure Drafts were at opposite extremes on this matter but that limiting

³¹ *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, October 2018, p. 255.

³² *Proof Transcript of Evidence*, 21 September 2018, p. 4.

³³ *Proof Transcript of Evidence*, 21 September 2018, p. 5.

³⁴ *Proof Transcript of Evidence*, 24 September 2018, pp. 30, 47.

³⁵ *Submission 14*, ACT Bar Association, p. 4.

it to judges left out entirely competent people.³⁶ The Ethics and Integrity Adviser suggested that the Exposure Draft would “rule out a lot of people who might be well suited to the job”.³⁷

- 3.5 When asked about the selection criteria in the Exposure Draft officials informed the Committee that they considered that it was very important that the appointee had sufficient experience and:

an understanding of the range of issues that the commission might consider and also in terms of the diversity of the responsibilities of the territory. Because the bill covers a range of public officials, not just the public service, we thought it was important to have somebody with quite substantial skills and experience to take on this really important role.³⁸

COMMITTEE COMMENT

- 3.6 The Committee notes that with the way in which the Exposure Draft is currently drafted the eligibility criteria for a Commissioner are more restrictive than any other jurisdiction in Australia. NSW, Victoria, Queensland and Western Australia all permit those who are “qualified to be appointed” to relevant judicial roles to be appointed Commissioner whereas the Exposure Draft requires an appointee to have served in those roles. Other jurisdictions permit the appointment of legal practitioners who have practised for a minimum period of time.
- 3.7 The Committee noted that the Bill prohibits the appointment of a former member of the Assembly, the Commonwealth Parliament, or a state legislature as Commissioner. The Exposure Draft only prohibits those who have been a member of those bodies in the five years immediately preceding the appointment. The Committee discussed this distinction noting other safeguards in the appointment process and the possible effect on public perception of, and trust in, a Commission led by a former politician.

Recommendation 7

- 3.8 **The Committee recommends that the criteria for eligibility for Commissioner and Inspector allow for the appointment to the role of a former judge, as listed in s26(1) of the Exposure Draft, or an Australian legal practitioner of not less than 10 years standing.**

Recommendation 8

³⁶ *Proof Transcript of Evidence*, 24 September 2018, p. 19.

³⁷ *Proof Transcript of Evidence*, 24 September 2018, p. 27.

³⁸ *Proof Transcript of Evidence*, 28 September 2018, p. 61.

- 3.9 The majority of the Committee recommends that the criteria for eligibility for Commissioner prohibit the appointment of a former member of the Legislative Assembly to the role.³⁹**

TERM OF APPOINTMENT

- 3.10 The Office of the Legislative Assembly further submitted that the terms of appointment for the Commissioner and CEO should differ in order to avoid the loss of institutional knowledge that would occur if both positions were to become vacant at the same time.⁴⁰

COMMITTEE COMMENT

- 3.11 The Committee agrees that the terms of appointment for the Commissioner and CEO should be of different lengths.

Recommendation 9

- 3.12 The Committee recommends that the terms of appointment for a Commissioner and CEO of the Commission be of different lengths to ensure continuity of operations.**

CONFLICT OF INTEREST

- 3.13 Both the Bill and the Exposure Draft prohibit the Commissioner from engaging in paid employment or unpaid activity that is inconsistent with the Commissioner's functions.⁴¹ The Bill requires the Commissioner to disclose conflicts or potential conflicts to the Speaker and to not take part in the consideration of any matter in which they have a conflict without the Speaker's permission.⁴² The Bill also contains provisions that apply if the Commissioner claims to be unaware of a conflict.⁴³ The Exposure Draft requires the Commissioner to give a written statement of personal and financial interest to the Speaker at certain times.⁴⁴

COMMITTEE COMMENT

- 3.14 The Committee notes that an explanatory note to s29 of the Exposure Draft states that the Commissioner must take all reasonable steps to avoid a conflict of interest and refers to the

³⁹ Mr Steel and Ms Cody preferred the legislation to remain silent on the matter given the other checks in the legislation regarding the appointment of the Commissioner, including consultation with parties in the Assembly and the relevant committee, and approval of the appointment by resolution passed by a majority of at least 2/3 of the members.

⁴⁰ *Submission 09*, Office of the Legislative Assembly, p. 23.

⁴¹ Anti-Corruption and Integrity Commission Bill 2018, s 102(1), Integrity Commission Bill 2018 Exposure Draft, s 30.

⁴² Anti-Corruption and Integrity Commission Bill 2018, s 102(2) and (3).

⁴³ Anti-Corruption and Integrity Commission Bill 2018, s 102(4).

⁴⁴ Integrity Commission Bill 2018 Exposure Draft, s 29.

Public Sector Management Act 1994 (PSM Act), s9. The Committee notes that the Commissioner is not a public servant. The Exposure Draft states that, where matters are not provided for in the legislation, the Commissioner is appointed on terms prescribed by the management standards under the PSM Act.⁴⁵ As the legislation does provide for conflict of interest provisions it is unclear how the PSM Act applies.

Recommendation 10

- 3.15 The Committee recommends that the provisions relating to the Commissioner's conflicts of interest in s29 of the Exposure Draft be reviewed to consider improved drafting, including drawing on s102 of the Bill.**

ACTING COMMISSIONER

- 3.16 The Bill and the Exposure Draft differ in their approaches to appointing Acting Commissioners. The Bill relaxes some of the processes to make it easier to appoint an Acting Commissioner than a Commissioner⁴⁶ while the Exposure Draft does not. Neither piece of legislation limits the term of an Acting Commissioner, which the ACT Bar Association viewed as a serious omission.⁴⁷

COMMITTEE COMMENT

- 3.17 The Committee agrees that the maximum period in which there may be an Acting Commissioner should be defined in the legislation. The Committee believes that the appointment of an Acting Commissioner should be for a term of six months, and any and all subsequent extensions of the acting role should trigger consultation with the relevant Assembly committee.
- 3.18 The Committee notes that the Bill removes the requirements for an open and accountable selection process and a 2/3 majority in the Assembly for the appointment of an Acting Commissioner.⁴⁸ The Committee believes that this is appropriate but does not support any change in the type of person eligible for the role.⁴⁹
- 3.19 The Committee notes the explanatory note to s97 of the Bill which states that s220 of the *Legislation Act 2001* clarifies that acting appointees have all the functions of the occupant of

⁴⁵ Integrity Commission Bill 2018 Exposure Draft, s 25(4).

⁴⁶ Anti-Corruption and Integrity Commission Bill 2018, s 97(3).

⁴⁷ *Submission 14*, ACT Bar Association, p. 4.

⁴⁸ Anti-Corruption and Integrity Commission Bill 2018, s 97(3).

⁴⁹ The Committee does not support provisions of the effect of Anti-Corruption and Integrity Commission Bill 2018, s 97(3)(c).

the position. The Committee believes that this note should be replicated in the final legislation as an aid to interpretation.

Recommendation 11

- 3.20 **The Committee recommends that the maximum term of appointment of an acting Commissioner be defined in the legislation as six months and that any reappointment to a further six month term be subject to consultation with the relevant Assembly committee.**

Recommendation 12

- 3.21 **The Committee recommends that the legislation be amended to include the explanatory note to s97 of the Bill regarding acting appointments.**

SUSPENSION OF A COMMISSIONER

- 3.22 The Office of the Legislative Assembly submitted:

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.[. . .]

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.⁵⁰

COMMITTEE COMMENT

- 3.23 The Committee agrees that bankruptcy and insolvency potentially opens a Commissioner to external pressure and allowing for suspension while allegations are investigated would be appropriate.

Recommendation 11

- 3.24 **The Committee recommends that bankruptcy and insolvency be grounds to suspend a Commissioner.**
- 3.25 The Bill has as one of the grounds for suspension of a Commissioner "failure to take all reasonable steps to avoid being placed in a position where a conflict of interest arises during

⁵⁰ *Submission 09*, Office of the Legislative Assembly, p. 23.

the exercise of the commissioner's functions."⁵¹ The Exposure Draft does not include a similar provision.

COMMITTEE COMMENT

- 3.26 The Committee notes that the Exposure Draft empowers the Speaker to suspend the Commissioner on the ground of misbehaviour.⁵² It could be argued that significant failures to address conflict of interest matters would be considered misbehaviour.

Recommendation 14

- 3.27 **The Committee recommends that the ACT Government consider whether failure by the Commissioner to disclose conflict of interest matters would be considered "misbehaviour" under s33 of the Exposure Draft, as that term is generally understood, or whether the more specific provisions on this matter in s105 of the Bill should be adopted.**

COMMISSION STAFF

- 3.28 Both proposed pieces of legislation include provision for the employment of staff on behalf of the Territory.

COMMITTEE COMMENT

- 3.29 The Committee notes that the Exposure Draft sets out how a CEO of the Commission is to be appointed and circumstances under which the Commissioner must terminate the CEO's employment. The Exposure Draft provides no mechanism for suspending the CEO and it is unclear to the Committee whether this was considered unnecessary or whether the drafters believe that such processes are governed by other legislation, such as the Public Sector Management Act. The Committee believes that it may be useful to clarify the legislation in this respect.

Recommendation 12

- 3.30 **The Committee recommends that the ACT Government consider the question of how a CEO of the Commission could be suspended and, if necessary, insert suspension provisions in the legislation.**

⁵¹ Anti-Corruption and Integrity Commission Bill 2018, s 105(1)(b).

⁵² Integrity Commission Bill 2018 Exposure Draft, s 33(1).

ELIGIBILITY TO BE EMPLOYED BY THE COMMISSION

3.31 In its report, the original committee recommended that staff of the Commission should not have (or have had) any political affiliations.⁵³ The Bill places greater restrictions on who may be employed by the Commissioner than does the Exposure Draft. The Bill prevents current or former members of political parties from being employed as staff and anyone who has been a public servant in the 10 years immediately prior to appointment from being employed as a senior officer.⁵⁴ The Exposure Draft does not contain such restrictions.

3.32 In its submission the ACT Human Rights Commission stated in regards to the Bill:

Section 112 gives rise to significant compatibility concerns with the right to equality and non-discrimination in s 8 of the HR Act, which prohibits discrimination on a range of grounds, including political opinion, and the right to have access, on general terms of equality, for appointment to the public service in s 17 of the HR Act. While the avoidance of any real or perceived conflict of interest is a legitimate objective, we consider that automatic exclusion that extends to prior political party membership, irrespective of the amount of time that has lapsed since that affiliation, is overbroad and disproportionate to the objectives of the measure. It does not appear that integrity commissions in other jurisdictions impose similar limitations on the employment of staff members. We consider that the equivalent provisions in the Government's exposure draft bill, which place a time limit on the exclusion, are to be preferred.⁵⁵

3.33 In its submission the CPSU stated:

regarding the Opposition Bill and engagement of staff, the CPSU does not believe it is appropriate for Commission staff to exclude membership of political parties as a selection criteria outlined in clause 112. Such an exclusion is at odds with proper management principles and ACT discrimination law. It is also at variance to the NSW ICAC Staff Code of Conduct 2018, which does not seek to prevent political engagement.⁵⁶

3.34 The CPSU also indicated that they opposed section 48 of the Exposure Draft which permits the Commission to ask prospective staff of the Commission to disclose any personal interests that the Commission considers relevant. The CPSU considers the provision unnecessary as conflicts of interest are already addressed in the ACTPS code of conduct.⁵⁷

⁵³ *Inquiry into the establishment of an Integrity Commission for the ACT*, Select Committee on an Independent Integrity Commission 2018, p. 270.

⁵⁴ Anti-Corruption and Integrity Commission Bill 2018, s 112.

⁵⁵ *Submission 07*, ACT Human Rights Commission, p. 5.

⁵⁶ *Submission 12*, CPSU, p. 1.

⁵⁷ *Submission 12*, CPSU, p. 1.

COMMITTEE COMMENT

- 3.35 The Committee notes that the Exposure Draft places no restrictions on staff political affiliation (time limited exclusions apply to the appointment of the Commissioner and the Inspector). The Committee discussed this issue, noting that public servants are not generally precluded from expressing political opinion but also noting the importance of avoiding real or perceived conflicts of interest in the activities of the Commission.
- 3.36 The Committee considers it appropriate that, given the nature of its work, the Commission have conflict of interest procedures. It is important, however, that these procedures be clearly documented and be made available to current and prospective staff. The ACTPS code of conduct provides a useful basis for developing guidelines.

Recommendation 13

- 3.37 **The majority of the Committee recommends that the legislation require that staff of the Commission not have been an ACT public servant in the last 5 years.**⁵⁸

Recommendation 14

- 3.38 **The Committee recommends that the legislation require the Commission to develop and publish guidelines for personal interest disclosures requested under s48 of the Exposure Draft.**

ROLE OF THE SPEAKER

- 3.39 The Office of the Legislative Assembly submitted that the Speaker should be able to seek administrative support and advice in discharging their functions under the legislation, in the same way that the Speaker can when discharging their functions under the *Auditor-General's Act 1996* or *Electoral Act 1992*.⁵⁹

COMMITTEE COMMENT

- 3.40 The Committee supports the recommendation of the Office of the Legislative Assembly. The Committee notes the increased workload on the Speaker caused by the creation of Officers of the Assembly and believes that further thinking on ensuring the Speaker has adequate support is required.

⁵⁸ Mr Steel and Ms Cody did not agree to exclude ACT public servants as staff of the Commission. Mr Steel and Ms Cody believe many positions, including Executive Assistants, drivers and cleaners, can be transferrable.

⁵⁹ *Submission 09*, Office of the Legislative Assembly, p. 20.

Recommendation 15

- 3.41 **The Committee recommends that the legislation authorise the Speaker to seek administrative support and advice in discharging the Speaker's statutory role under the legislation, in a similar way as s37B of the *Auditor-General's Act 1996* and s37A of the *Ombudsman Act 1989*.**

Recommendation 16

- 3.42 **The Committee recommends that the Standing Committee on Administration and Procedure examine the level and manner of support to the Speaker in performing her statutory roles under Officer of the Assembly legislation.**

4 ADDRESSING CORRUPTION

DEFINITION OF CORRUPT CONDUCT

4.1 The original committee recommended that:

the definition of ‘corrupt conduct’, as set out in Part 3 of the NSW Independent Commission Against Corruption Act 1988, should form the definition of ‘corrupt conduct’ in the enabling legislation of an ACT Anti-Corruption and Integrity Commission.⁶⁰

4.2 It further recommended that the Commission’s:

scope of conduct be focused on investigating matters where they involve serious or systemic corruption. While the Committee believes that the focus should necessarily be on serious and systemic corruption, any legislation should not be drafted in a way that would unduly limit the scope of [the Commission].⁶¹

4.3 Clauses 7 and 8 of the Bill define corrupt conduct. The Bill does not contain a definition of serious or systemic corrupt conduct. The Exposure Draft defines corrupt conduct by a person⁶² and corrupt conduct by a public official⁶³ separately. The Exposure Draft defines serious corrupt conduct as “corrupt conduct that is likely to threaten public confidence in the integrity of government or public administration”⁶⁴ and systemic corrupt conduct as “instances of corrupt conduct that reveal a pattern of corrupt conduct in 1 or more public sector entities”⁶⁵.

4.4 The Exposure Draft sets out the functions of the Commission and states:

(2) In exercising its functions, the commission must prioritise the investigation and exposure of corrupt conduct which the commission considers may constitute serious corrupt conduct or systemic corrupt conduct.

(3) Subsection (2) does not restrict the commission’s discretion to decide to investigate any matter that the commission considers may constitute corrupt conduct.⁶⁶

⁶⁰ *Inquiry into the establishment of an Integrity Commission for the ACT*, Select Committee on an Independent Integrity Commission 2018, p. 204.

⁶¹ *Inquiry into the establishment of an Integrity Commission for the ACT*, Select Committee on an Independent Integrity Commission 2018, p. 205.

⁶² Integrity Commission Bill 2018 Exposure Draft, s 9.

⁶³ Integrity Commission Bill 2018 Exposure Draft, s 10.

⁶⁴ Integrity Commission Bill 2018 Exposure Draft, s 17.

⁶⁵ Integrity Commission Bill 2018 Exposure Draft, s 18.

⁶⁶ Integrity Commission Bill 2018 Exposure Draft, s 23.

4.5 Regarding the Bill's definition of corrupt conduct Mr Coe said:

We have gone for a broader definition than the government, noting that the object of the legislation is to uphold integrity but also to deter corruption from taking place in the first place. I think that having the broader definition will have the utmost deterrent but also will allow the commissioner to really apply the principle of upholding integrity to the full. Again, it could be abused, but every magistrate, every judge, every public official could abuse their positions as well, but we accept that we are going to trust people so long as there is appropriate oversight.

I think the broader definition is important. I think including codes of conduct is important. I think misconduct should be included. I expect that the commissioner will triage their case load and will not concentrate on the missing pens from the stationery cupboard, even if that does technically meet everyone's definition of theft. We are trusting the commissioner to handle things with discretion.⁶⁷

4.6 The CPSU told the Committee that:

In terms of the definition of "corruption", CPSU members support the focus upon serious corrupt conduct in terms of the government's exposure draft. It is our view that the exposure draft needs an explicit definition of what "serious corrupt conduct" is. What we do not want to see is a muddying of the waters between misconduct provisions that are picked up in enterprise agreements and what should be done in terms of the ACT government as an employer contrary to the role of the integrity commission. They need to be quite separate in our view.⁶⁸

4.7 In his submissions Tony Harris stated that the Bill:

by applying the concept to acts that are not necessarily serious, gives useful scope to the proposed Commission to follow its own judgement about what matters it will investigate. That feature also reduces the prospect of legal action about what constitutes "serious" designed to frustrate the Commission.⁶⁹

4.8 Officials noted that misconduct is not in the definition of "serious or systemic corrupt conduct" because the Public Sector Standards Commissioner already has responsibility for this under public service enterprise agreements.⁷⁰ The Head of Service told the Committee that:

Under the Public Sector Management Act misconduct has a very low threshold but has no upper limit. I do not think there is a risk of a gap being left because it will always be misconduct; it is just that some misconduct is so serious or systemic that it would be appropriate to go to an integrity commission.

⁶⁷ *Proof Transcript of Evidence*, 21 September 2018, p. 10.

⁶⁸ *Proof Transcript of Evidence*, 28 September 2018, p. 51.

⁶⁹ *Submission 04*, A.C. Harris, p. 2.

⁷⁰ *Proof Transcript of Evidence*, 28 September 2018, p. 67.

I do not think that there is a concern that something could fall into the gap. I think the greater concern is that the resources of the commission be able to focus on the most important and most egregious behaviour and not be distracted by things that other bodies can already appropriately investigate.⁷¹

COMMITTEE COMMENT

- 4.9 The Committee believes that the definition of corrupt conduct set out in the New South Wales legislation has the appropriate scope and is the correct approach for the Territory. This approach is best reflected in the Bill's definition of corrupt conduct.
- 4.10 The Committee supports the definitions of "serious corrupt conduct" and "systemic corrupt conduct" used in the Exposure Draft as providing a useful focus for the Commission's work.

Recommendation 17

- 4.11 The Committee recommends that the legislation be examined to ensure that it incorporates the full extent of the NSW definition of corrupt conduct, as reflected in the Bill, but maintain the focus on "serious corrupt conduct" and "systemic corrupt conduct".**

RETROSPECTIVITY

- 4.12 There was discussion about whether the Bill had no limit for the Commission's possible retrospective inquiries into possible corrupt conduct whereas the Exposure Draft was limited to corrupt conduct since self-government. When asked Mr Coe indicated that he had no problem with 1989 being the start date but indicated that he felt it highly unlikely that it would be relevant as investigations would focus on more recent events.⁷²
- 4.13 The Explanatory Statement to the Exposure Draft states that:

On the basis of clause 8, matters to be investigated by the Integrity Commission would not go beyond self-government, given that the ACT was administered by the Commonwealth Government prior to 1989. The Integrity Commission does not have jurisdiction of matters prior to 1989 – these matters would fall to the Commonwealth.⁷³

⁷¹ *Proof Transcript of Evidence*, 28 September 2018, p. 67.

⁷² *Proof Transcript of Evidence*, 21 September 2018, pp 2-3.

⁷³ Explanatory Statement to the Integrity Commission Bill 2018 Exposure Draft, p. 47.

COMMITTEE COMMENT

- 4.14 The Committee observed that there had been discussion about the commencement of self-government being the limit to retrospective investigations but found the Exposure Draft to be unclear on this point. The Committee observes that the bar on the Commission investigating conduct it considers “happened at too remote a time to justify investigation”⁷⁴ provides an effective limit and promotes Commission activity focussed on recent conduct, and the Committee believes that this is appropriate. The Committee notes the Explanatory Statement but wonders whether a more explicit statement is desirable.

Recommendation 18

- 4.15 **The Committee recommends that the ACT Government consider whether the legislation should explicitly state that the Commission has no jurisdiction prior to 1989.**

CODES OF CONDUCT

- 4.16 The Office of the Legislative Assembly noted that, in its definition of corrupt conduct, the Bill includes conduct that could, in the case of a Minister or a Member of the Legislative Assembly constitute or involve a substantial breach of an applicable code of conduct.⁷⁵ The Bill goes on to define the Ministerial and Legislative Assembly codes of conduct as applicable codes.⁷⁶ The Office notes that this places the Commission in the role of Legislative Assembly Commissioner for Standards. It further notes that the codes of conduct were not designed to be used to measure corrupt conduct.⁷⁷ The Committee notes that the Legislative Assembly Commissioner for Standards will address possible breaches of the code of conduct.

COMMITTEE COMMENT

- 4.17 The Committee shares the concerns of the Office of the Legislative Assembly. The codes of conduct contain provisions that sit poorly with consideration of corrupt conduct. For example while everyone would agree that MLAs should “Treat all citizens of the Australian Capital Territory with courtesy, and respect the diversity of their backgrounds, experiences and views”⁷⁸ even a substantial breach of this provision would not be an appropriate area of investigation for an anti-corruption agency. The Committee believes that potential corrupt

⁷⁴ Integrity Commission Bill 2018 Exposure Draft, s 8(2)(f).

⁷⁵ Anti-Corruption and Integrity Commission Bill 2018, s 7(1)(a)(iv).

⁷⁶ Anti-Corruption and Integrity Commission Bill 2018, s 7(3).

⁷⁷ *Submission 09*, Office of the Legislative Assembly, pp. 27-28.

⁷⁸ Standing Orders of the ACT Legislative Assembly, Continuing Resolution 5, 11.

conduct by members is appropriately captured in the Exposure Draft without reference to the codes of conduct.

PREVIOUS INVESTIGATIONS

4.18 In its submission the ACT Bar Association highlighted the following provisions in the Exposure Draft:

(3) In addition, the commission may conduct an investigation under chapter 3 in relation to conduct that happened entirely before the commencement of this section only if the commission is reasonably satisfied that—

(a) it is in the public interest for the commission to investigate the conduct; and

(b) in all the circumstances, it is appropriate for the commission to investigate the conduct, having regard to the commission’s function of investigating conduct that is alleged to be corrupt conduct; and

(c) if another investigatory body has already investigated or decided not to investigate the conduct—there is reliable, substantial and highly probative evidence that—

(i) was not considered by the investigatory body; or

(ii) the investigatory body’s investigation or decision not to investigate was materially affected by error.⁷⁹

4.19 The ACT Bar Association noted that it had been suggested that this provision was intended to prevent the Commission from investigating issues that had previously been investigated by the Auditor-General. The ACT Bar Association questioned whether the provision would actually have that effect given the difficulty in determining what “conduct” had been investigated in any given case. It suggested instead that previous investigation should simply be a consideration in whether investigation by the Commission was in the public interest.⁸⁰

4.20 The Explanatory Statement to the Exposure Draft states that section 8(3) “acts as a safeguard in ensuring the Commission is not going to expose people to additional penalties that have been punished or disciplined.”⁸¹

4.21 The Committee raised this issue with officials during public hearings and was informed that previous investigations could be the subject of MOUs between referral agencies.⁸² The Chief Minister informed the Committee that the provision “also ensures that the Integrity

⁷⁹ Integrity Commission Bill 2018 Exposure Draft, s 8(3).

⁸⁰ *Submission 14*, ACT Bar Association, pp. 2-3.

⁸¹ Explanatory statement to Integrity Commission Bill 2018 Exposure Draft, p 47.

⁸² *Proof Transcript of Evidence*, 28 September 2018, pp 61-63.

Commission can manage its resources effectively by prioritising matters which have not been previously investigated.”⁸³

COMMITTEE COMMENT

- 4.22 The Committee does not believe that possible MOUs between referral agencies addresses the question of whether previous investigations by agencies whose role is not to investigate corrupt conduct should prevent the Commission from conducting its own investigations. Investigations by the Auditor-General or the Ombudsman are not aimed at determining whether conduct was corrupt and the requirement for new “reliable, substantial and highly probative evidence” or material error is an overly high bar for further investigation. Nor do these bodies have the all the coercive powers of the Commission.
- 4.23 Regarding the issue of “additional penalties” the Committee notes that the Commission makes findings of fact only. Any additional penalties would only come if a prosecutorial or disciplinary body considered that the findings of the Commission rendered previous action inadequate.
- 4.24 The Committee notes that the legislation intends to have a person of considerable experience in the role of Commissioner. The Committee believes that that person should be trusted to take into consideration any previous investigations in their determination of whether it is in the public interest to investigate conduct that occurred prior to the commencement of the legislation.

Recommendation 19

- 4.25 **The Committee recommends that the legislation be amended to make previous investigation by another body a consideration in the Commissioner’s determination if an investigation is in the public interest and not a bar to investigation by the Commission.**

DEFINITION OF PUBLIC AUTHORITY

- 4.26 The Bill includes in its definition of “public official” a certifier under the *Building Act 2004*.⁸⁴ The Exposure Draft does not specifically name certifiers but does include in its definition “a contractor, employee of a contractor, or volunteer exercising a function of, a public sector entity”.⁸⁵

⁸³ Answer to Question Taken on Notice, Chief Minister, 5 October 2018.

⁸⁴ Anti-Corruption and Integrity Commission Bill 2018, s 10(h).

⁸⁵ Integrity Commission Bill 2018 Exposure Draft, s 11(b)(vii)(B)

COMMITTEE COMMENT

4.27 The Committee believes that it would be unusual to single out certifiers as a specific group for coverage in the legislation. It does raise the question, however, of how the legislation should treat those licenced to carry out activities that were once carried out by government. Examples of such roles include certifiers, those issuing green slips for motor vehicles and accredited driver instructors. In such cases there is no contractual relationship between the government and the provider but the provider is providing a quasi-governmental service in areas that are potentially open to corruption.

Recommendation 20

4.28 **The Committee recommends that the ACT Government consider whether the definition of public authority in the legislation should be amended to cover persons that do not have a contractual relationship with government but are licenced by government to provide certain services.**

COVERAGE OF THE JUDICIARY

4.29 In the original committee's report it recommended that the Commission have oversight of Judicial Officers.⁸⁶ The Bill includes judges, magistrates and any other holder of judicial office in its definition of public official.⁸⁷ The Exposure Draft explicitly excludes judicial officers from its definition of public official.⁸⁸

4.30 Mr Coe informed the Committee that he was :

very concerned that if you exclude a cohort, you potentially have a gap that is not covered by the integrity commission, nor is it included by whatever other body is meant to be looking into that issue. Of course, there is the judicial council here that has the integrity function for the judiciary. What I would much rather see is that the commissioner would either negotiate or work with the other integrity bodies to ensure that there is no gap and that where there is a jurisdictional or overlap issue they can resolve it with one of them taking it over, rather than actually having a gap and it falling through the crack.⁸⁹

4.31 The ACT Bar Association observed that:

⁸⁶ *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, October 2017, p. 201.

⁸⁷ Anti-Corruption and Integrity Commission Bill 2018, s 10(d).

⁸⁸ Integrity Commission Bill 2018 Exposure Draft, s 11(c)(v)-(vii).

⁸⁹ *Proof Transcript of Evidence*, 21 September 2018, p. 5.

It is a separation of powers issue. [. . .] In relation to judicial officers, you have got the executive investigating judicial officers through the commission's process. That is where the difference lies. I am trying to conceive of a situation where, in practice, the processes of the judicial commission would not be sufficient to raise the threshold of an investigation in that context and would not permit an appropriate investigation of the conduct of the judicial officer.⁹⁰

- 4.32 The Committee discussed the issues with the Chief Minister and officials who pointed to the role of the Judicial Council. They noted that a "judicial officer is clearly subject to the jurisdiction of the court itself and to the Chief Justice. Ultimately, the resolution of any allegation of misconduct against a judge is determined by the Assembly."⁹¹ When asked about the difference in powers between the bodies, officials noted that "the powers are not the same along the way but the mechanisms and the investigations do become progressively more serious as you progress through the process."⁹²

COMMITTEE COMMENT

- 4.33 The original committee spent significant time considering this issue and concluded that judicial officers should be included within the scope of the legislation. This Committee has come to the same conclusion. Regarding the separation of powers the Committee notes that members of two branches of government, the executive and the legislature, are covered by the Exposure Draft. The privileges of the Assembly will be protected (and the Committee has made recommendations to further ensure that) but members will still be subject to investigation and possible findings of corrupt conduct. The Commission can make such findings but action against members remains the prerogative of the Assembly.
- 4.34 The Committee believes that a similar approach should be taken to judicial officers. It is not the expectation of the Committee that the Commission would usurp the role of the Judicial Council. The Judicial Council would handle the majority of complaints whether by receiving them directly or by having them referred by the Commission. The Judicial Council does not have, however, the powers of the Commission to investigate, including through the use of surveillance and covert operations. The Judicial Council may wish to call upon the commission to use those powers in exceptional cases, something that the Commission could not do if judicial officers are excluded from its jurisdiction via legislation.
- 4.35 The Committee acknowledges that the Assembly has endorsed the Latimer House Principles on the Three Branches of Government.⁹³ These principles state that the judiciary should be independent and, amongst other things, that "Interaction, if any, between the executive and

⁹⁰ *Proof Transcript of Evidence*, 24 September 2018, p. 45.

⁹¹ *Proof Transcript of Evidence*, 28 September 2018, p. 71.

⁹² *Proof Transcript of Evidence*, 28 September 2018, p. 72.

⁹³ Continuing resolution of the Assembly 8A.

the judiciary should not compromise judicial independence. Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties”.⁹⁴

- 4.36 The Committee is of the view that a cooperative approach to referrals will ensure that the Judicial Council continues to be responsible for dealing with possible judicial misconduct but the Commission is not prevented from fully investigating possible corrupt conduct. The Commission can make findings of fact but the decision to take action against a judicial officer remains with the Judicial Council.

Recommendation 21

- 4.37 **The majority of the Committee recommends that the definition of public official include members of the judiciary and judicial officers.**⁹⁵

COVERAGE OF ACT POLICING

- 4.38 In the original committee’s report it recommended that the Commission have oversight of “policing officers funded to deliver services by and to the ACT taxpayer and community”.⁹⁶ Both the Bill and the Exposure Draft attempt to give effect to this recommendation. The Exposure Draft delays commencement of provisions concerning ACT Policing and the AFP by 12 months to allow for consultations with the Commonwealth Government.
- 4.39 The *Australian Capital Territory (Self-Government) Act 1988* states that the Assembly has no power to make laws with respect to the provision by the Australian Federal Police of police services in relation to the Territory.⁹⁷ The Act also prevents the Assembly from making laws that bind the Commonwealth without the agreement of the Commonwealth Government to amend Commonwealth legislation.⁹⁸

COMMITTEE COMMENT

- 4.40 The Committee acknowledges that this is an area where Commonwealth cooperation is required.

⁹⁴ Continuing resolution of the Assembly 8A s2(d)(iv).

⁹⁵ Ms Cody and Mr Steel held a different view to the majority of the Committee. They believe that, due to concerns over preserving the separation of powers, the judiciary should not be covered by the legislation.

⁹⁶ *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, October 2017, p. 199.

⁹⁷ *Australian Capital Territory (Self-Government) Act 1988*, s23(1).

⁹⁸ *Australian Capital Territory (Self-Government) Act 1988*, s27.

OBLIGATION TO REPORT CORRUPT CONDUCT

4.41 The original committee recommended that:

mandatory reporting should apply within the ACT Public Service—such that Directors-General (and equivalents) have a duty to notify [the Commission] of any information or allegation that raises a corruption issue in his or her agency. Further, these requirements for mandatory reporting should be accompanied by the development of guidelines to assist those to whom mandatory reporting provisions apply.⁹⁹

4.42 The submission of the ACT Ombudsman said that while it would be his intention to refer matters of serious corrupt conduct to the Commission, a requirement to do so would be incompatible with the Ombudsman Act.¹⁰⁰ The Exposure Draft exempts the Ombudsman from mandatory corruption notification directions¹⁰¹ but not mandatory corruption notification requirements. The Acting ACT Ombudsman said that:

The Ombudsman Act continues the general principles of ombudsmen elsewhere, including our powers and functions under the commonwealth act, which include issues to do with the independence of the Ombudsman. The Ombudsman cannot be directed by other agencies to undertake various parts of work, and also the Ombudsman investigates in private. And they are the issues that we raised in our submission. We think that having a mandatory corruption notification requirement then becomes like a direction on the ACT Ombudsman. It is butting against those principles of the Ombudsman undertaking, as I say, investigations in private and the Ombudsman being independent and not compellable.¹⁰²

4.43 Tony Harris said that he would extend mandatory reporting requirements beyond heads of agencies as they:

are not the only ones who see corruption. The corruption can be seen by senior officers. Indeed, senior officers can see corruption by heads of agencies. I would extend the requirement to senior officers and their equivalent—SES officers and their equivalent.¹⁰³

4.44 Mr Harris believed that no public official should be exempt from mandatory reporting requirements¹⁰⁴ saying:

⁹⁹ *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, October 2017, p. 210.

¹⁰⁰ *Submission 06*, ACT Ombudsman, p. 3.

¹⁰¹ Integrity Commission Bill 2018 Exposure Draft, s 62(6).

¹⁰² *Proof Transcript of Evidence*, 24 September 2018, pp. 15-16.

¹⁰³ *Proof Transcript of Evidence*, 24 September 2018, p. 19.

¹⁰⁴ *Proof Transcript of Evidence*, 24 September 2018, p. 23.

You have excluded the Auditor-General from advising the commission of a suspected corrupt activity and I do not know why. As the Auditor-General in New South Wales, I advised the ICAC on a couple of occasions. It did not worry me that I did it. In fact, I was pleased to do it in some senses because I could pass the problem over to the commission. I do not understand why they are exempt.¹⁰⁵

- 4.45 The Committee asked officials about the proposal to extend mandatory reporting requirements to include SES officers. The Committee was informed that officers already have an obligation under the Public Interest Disclosure Act to report to their director-general. The Public Sector Management Act also has provision for reporting particular types of conduct to the Head of Service.¹⁰⁶

COMMITTEE COMMENT

- 4.46 The Committee notes the view of officials that there is already a chain of reporting to heads of agencies. The PID Act section 17 requires disclosure officers to report the disclosure to the head of agency and potentially the head of service and ombudsman. The *Public Sector Management Act 1994* section 24 requires a public servant (the discloser) to inform the head of service of any maladministration or corrupt or fraudulent conduct by a public servant or a public sector member of which the discloser becomes aware.
- 4.47 The Committee acknowledges the views of officials that there is already a chain of reporting but believes that it is important that senior officials have a personal obligation to report corrupt conduct.
- 4.48 The Committee considered whether various individuals or bodies should be exempted from mandatory notification requirements. The Committee believes that those leading independent bodies should not be subject to mandatory notification requirements. The Committee notes that the Exposure Draft exempts independent bodies from mandatory corruption notification directions¹⁰⁷ but still captures the heads of those bodies under the mandatory notification requirements for the heads of public sector entities.¹⁰⁸ The Committee wonders whether the drafting intended to exempt independent bodies from having to notify possible corrupt conduct uncovered in the course of their work but still require the heads of the bodies to report possible corrupt conduct within their own organisation. If that is the case, the Committee does not believe that the Exposure Draft as currently drafted achieves that effect.
- 4.49 The Committee notes that the Exposure Draft exempts the Speaker from mandatory notification requirements in the same way as independent bodies. The Committee believes

¹⁰⁵ *Proof Transcript of Evidence*, 24 September 2018, p. 20.

¹⁰⁶ *Proof Transcript of Evidence*, 28 September 2018, p. 69.

¹⁰⁷ Integrity Commission Bill 2018 Exposure Draft, s 62(6).

¹⁰⁸ Integrity Commission Bill 2018 Exposure Draft, s 60.

that in this area the Speaker should conform to the standards of other MLAs but that it is appropriate that the Clerk be exempt. This exemption should mirror those that the Committee proposes for other independent bodies. For the Clerk, mandatory corruption provisions would not apply to his role in providing advice to members and the Speaker but would apply to his role leading the Office of the Legislative Assembly.

- 4.50 The Committee notes that the Exposure Draft requires a member of staff of an MLA to notify the Commission of possible serious corrupt conduct or systemic corrupt conduct. The Committee notes that a variety of staff work for MLAs, from experienced advisers to temporary workers assisting with communication activities. The Exposure Draft does not place mandatory reporting requirements on all public servants, only agency heads. The Committee believes that staff working for MLAs should be treated in the same way, with only the equivalent of a head of their agency, the MLA, being subject to the requirements.

Recommendation 22

- 4.51 **The Committee recommends that the legislation be amended so that Senior Executive Service officers are included in mandatory corruption notification provisions in s60 of the Exposure Draft.**

Recommendation 23

- 4.52 **The Committee recommends that provisions on mandatory corruption notifications be amended to make it clear that the following individuals are not subject to those provisions in performance of their duties but are subject to those provisions regarding possible serious or systemic corrupt conduct within their own organisations:**
- **The Auditor-General;**
 - **The Ombudsman;**
 - **The Electoral Commissioner;**
 - **The Human Rights Commissioner; and**
 - **The Clerk of the Legislative Assembly.**

Recommendation 24

- 4.53 **The Committee recommends that the Speaker not be exempt from mandatory corruption notification provisions.**

Recommendation 25

- 4.54 The Committee recommends that provisions on mandatory corruption notifications be amended to remove reference to a member of staff of an MLA.**

OFFENCE OF FAILING TO REPORT

- 4.55 The original committee recommended that:

where Directors-General (and equivalents) knowingly or wilfully fail to comply with an ACT Anti-Corruption and Integrity Commission's duty to notify it of any information or allegation that raises a corruption issue in their agency, penalties should apply.¹⁰⁹

- 4.56 The Bill includes a provision that makes it an offence for the principle officer of a public authority or a Minister to fail to report corrupt conduct to the Commission.¹¹⁰ The Exposure Draft has a similar duty to report but no offence provision for failure to do so.

- 4.57 Mr Tony Harris told the Committee that he found the offence provision appealing because he: saw in Sydney a number of heads of agencies not referring corrupt activity to the ICAC. This was after I retired. It concerned the Obeid matter. The officer that I knew, for reasons relating to his career prospects, did not want to even put an anonymous submission in to the ICAC. That was part of the reason that, even though they had an ICAC, we had this massive corruption at ministerial level in New South Wales. Having it as an offence not to do it imposes an obligation on a person, which I think is worth while.¹¹¹

- 4.58 The Chief Minister informed the Committee that:

The Government is of the view that a legislative requirement to report corruption matters to the Integrity Commission should be sufficient, instead of imposing penalties through a fine or sanction.¹¹²

COMMITTEE COMMENT

- 4.59 The Committee notes the evidence of Mr Harris regarding the experience of New South Wales and believes that an offence provision is appropriate, especially as mandatory reporting is only required in cases of suspected serious or systemic corrupt conduct. The Committee acknowledges that the inclusion of an offence provision makes training for anyone subject to

¹⁰⁹ *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, October 2017, p. 211.

¹¹⁰ Anti-Corruption and Integrity Commission Bill 2018, s 12(7).

¹¹¹ *Proof Transcript of Evidence*, 24 September 2018, p. 19.

¹¹² Answer to Question Taken on Notice 5, Chief Minister, 5 October 2018.

mandatory reporting requirements vital. The Committee makes further comments on the Commission's educative role later in this report.

Recommendation 26

- 4.60 The Committee recommends that the legislation include an offence of failing to make a mandatory corruption notification**

Recommendation 27

- 4.61 The Committee recommends that the Commission provide comprehensive training and education material to anyone subject to mandatory corruption notification requirements.**

COMPLAINTS AND REFERRALS

REFERRAL BY THE ASSEMBLY

- 4.62 The Bill provides for the Assembly to make referrals to the Commission¹¹³ and obliges the Commission to investigate such referrals.¹¹⁴ The Exposure Draft makes no such provision.
- 4.63 The Committee asked Mr Coe about the possibility of such a provision being abused for political purposes. Mr Coe noted that even without provision in the legislation there were various ways in which matters for the Commission could be raised in the Assembly and said that:

If you actually do accept that there is a political reality, you therefore try to manage it rather than pretend it does not exist. That is probably a better way forward. Yes, you could put a special majority in. Again, if the risk is that having the debate is the problem, a special majority is not going to change that. If it does get up and it goes to the integrity commission, and then it is upheld or there is a finding of corrupt conduct, then it was a good referral. If it is not, even with a special majority, then at least there is some closure to it. It will in part depend on what conventions develop in the Assembly as to whether this is a no-go zone or whether people are seeking to bring this up at every opportunity. But one way or another, I think the risk that you have identified exists regardless.¹¹⁵

¹¹³ Anti-Corruption and Integrity Commission Bill 2018, s 14.

¹¹⁴ Anti-Corruption and Integrity Commission Bill 2018, s 29(2).

¹¹⁵ *Proof Transcript of Evidence*, 21 September 2018, p. 9.

- 4.64 Former NSW auditor general Tony Harris, expressed the view that such a provision was not necessary, although it gave a little more weight to the referral.¹¹⁶
- 4.65 The Chief Minister expressed the view that this sort of provision added a political element to a referral and he could “immediately see it being abused politically”.¹¹⁷

COMMITTEE COMMENT

- 4.66 After careful consideration the Committee considers a power for the Assembly to refer matters to the commission to be unnecessary. The legislation allows anyone to make a referral and that should be sufficient. The Committee also notes, however, that even without a specific reference in the legislation Assembly Committees have the power to refer matters to the Commission by letter or through recommendations in a tabled report.

MAKING A COMPLAINT

COMMITTEE COMMENT

- 4.67 The Committee believes that the drafting of section 56 of the Exposure Draft may need revisiting as it appears to be a list of joint requirements rather than discrete options.

Recommendation 28

- 4.68 **The Committee recommends that s56(1) of the Exposure Draft be redrafted by removing “and” between the items on the list of ways in which a corruption complaint may be made.**

CONFIDENTIALITY OF COMPLAINTS

- 4.69 The Committee considered whether complaints made to the Commission should be confidential with an offence provision included in the legislation for breaching that confidentiality.
- 4.70 The NSW ICAC and Victorian IBAC do not require complaints to be kept confidential. The ICAC website warns complainants that good faith complaints made to the ICAC are protected from defamation proceedings but that that protection is not provided if the complaint is published in another forum.
- 4.71 Chapter 6 of the Exposure Draft sets out protections for complainants. Section 270 protects complainants from civil and criminal liability and from being accused of breaching various

¹¹⁶ *Proof Transcript of Evidence*, 24 September 2018, p. 20.

¹¹⁷ *Proof Transcript of Evidence*, 28 September 2018, pp. 69-70.

forms of confidence or ethics rules. Section 271 states that the complainant has a defence of absolute privilege for publishing the information in the complaint. Section 272 provides for the loss of the proceeding protections if the complaint is knowingly false or misleading, or vexatious.

COMMITTEE COMMENT

- 4.72 The Committee is concerned that the complaints procedure not be misused. The Committee considered making it an offence to reveal a complaint to anyone but the Commission but agreed that that would be overly punitive. The Committee believes that the New South Wales approach of complainants forfeiting protection from defamation if they choose to publicise their complaints is appropriate.

Recommendation 29

- 4.73 **The Committee recommends that the legislation be amended so that a complainant loses their absolute privilege from defamation should they publicly disclose the contents of a complaint prior to the Commission making it public.**

LEGISLATIVE ASSEMBLY COMMISSIONER FOR STANDARDS

REFERRAL POWERS

- 4.74 The Clerk told the Committee that:

With some other facts there may be an example where some breaches of the code of conduct with other behaviour could be construed as corrupt conduct. But I would argue that minor level breaches can be dealt with internally by the Commissioner for Standards. That is why I have argued in the submission that we should retain the Commissioner for Standards and have some sort of system where, if the Commissioner for Standards investigates a breach of the code of conduct and determines that there are some wider issues, there should be the ability for the Commissioner for Standards to refer to the integrity commissioner.

Equally, we have suggested that if the integrity commissioner looks at some sort of alleged breach and thinks that it is not of sufficient standard to be corrupt conduct, they could refer it back to the Commissioner for Standards and the Commissioner for Standards could do it.¹¹⁸

¹¹⁸ *Proof Transcript of Evidence*, 24 September 2018, pp. 33-34.

4.75 Officials informed the Committee that:

One of the key operational arrangements between the different parts of the integrity system from the Ombudsman to ACLEI and the other players is that there are two-way referral mechanisms built into both the legislation and their operating arrangements. There is a very strong degree of cooperation between those office holders to make sure that matters that could go to all of them end up in only one of them if that is appropriate and in the right one.

That can take a bit of working out for those that sit at the margins. There are lots that are very clear, but those officers are very much engaged in that process to make sure that issues end up in the right spot. We would not expect the integrity commissioner to operate in a different way as part of that broader scheme of integrity agencies.¹¹⁹

4.76 The ACT Government's submission also invited the Committee to consider amendments to continuing resolution 5AA to permit the Commissioner for Standards to refer matters to the Commissioner and for the Commissioner to refer matters to the Commissioner for Standards.¹²⁰

COMMITTEE COMMENT

4.77 The Committee notes that as the Legislative Assembly Commissioner for Standards is not a statutory body therefore it would not be appropriate to provide it with reference powers within the legislation. References within the Exposure Draft empowering the Legislative Assembly Commissioner for Standards to refer matters to the Commissioner should be removed, although provisions empowering the Commissioner to refer matters to the Legislative Assembly Commissioner for Standards should remain. The Committee agrees that amendments should be made to continuing resolution 5AA to permit mutual referrals. Once these changes are made the Legislative Assembly Commissioner for Standards will be able to make referrals to the Commission through the authority of the continuing resolution and the general power of the Commission to receive complaints.

4.78 The Committee also notes the powers of the Commission to ask for written reports and proposed actions from referral entities and does not believe that this should apply to Assembly referral entities.

Recommendation 30

4.79 The Committee recommends that the Standing Committee on Administration and Procedure develop amendments to continuing resolution 5AA to permit the Legislative Assembly

¹¹⁹ *Proof Transcript of Evidence*, 28 September 2018, p. 68.

¹²⁰ *Submission 10*, ACT Government, p. 4.

Commissioner for Standards to refer matters to the Commission and to receive and act on referrals from the Commission.

Recommendation 31

- 4.80 The Committee recommends that the legislation be amended by deleting s57(4)(d) to remove the Legislative Assembly Commissioner for Standards from the list.**

Recommendation 32

- 4.81 The Committee recommends that the legislation be amended by adding the Legislative Assembly Commissioner for Standards, the Speaker and Deputy Speaker to the list of entities in s104(2) from which the Commissioner may not ask for written reports**

JURISDICTION FOR REFERRALS

- 4.82 In its submission the Office of the Legislative Assembly stated:

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.

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).

The Office submits that it would be prudent to legislate in such a way as to enable a commission to refer matters [. . .] even where a commission did not have a power to investigate.¹²¹

COMMITTEE COMMENT

- 4.83 The Committee, particularly in light of its views on codes of conduct being excluded from the Commissioner's jurisdiction, agrees with the Office of the Legislative Assembly that the Commissioner should be empowered to refer matters outside their jurisdiction to Assembly entities. The Committee believes that cooperation between integrity agencies is essential and is concerned that by preventing the Commission from referring to other agencies matters

¹²¹ *Submission 09*, OLA, p. 26.

outside the Commission's jurisdiction the legislation inadvertently works against that cooperation.

Recommendation 33

- 4.84 **The Committee recommends that the legislation be reviewed to ensure that s103(1)(a) of the Exposure Draft, which prevents the Commission from referring a corruption report that it does not have the power to investigate, does not obstruct effective cooperation between integrity bodies.**

5 PRIVILEGE

PARLIAMENTARY PRIVILEGE

- 5.1 The submission of the Office of the Legislative Assembly highlighted the issue of the legislation inadvertently declaring some aspects of the Assembly's powers, privileges and immunities. The Self-Government Act states that the Assembly shall have the same powers as the House of Representatives until such time as the Assembly makes a law with respect to its powers. The Office noted 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.¹²²

- 5.2 The Office noted clauses in the Exposure Draft that require the Speaker to enter into MOUs on parliamentary privilege. The Office agreed that an MOU would be useful but submitted that there should be no statutory requirement for one.
- 5.3 The Office also highlighted clause 270(a)(iv) of the Exposure Draft, and a similar clause in the Bill,¹²³ which state that a complaint is not, if made in relation to a member of the Legislative Assembly, a contempt of the Assembly. The Office notes that similar language is used in s 35 of the *Public Interest Disclosure Act 2012* and expressed concern that such provisions could interact with the Self-Government Act in such a way as to sever the Assembly's enjoyment of the powers, privileges and immunities of the House of Representatives.¹²⁴

COMMITTEE COMMENT

- 5.4 The Committee agrees with the concerns expressed by the Office of the Legislative Assembly that the relevant provisions should be redrafted to ensure that they do not inadvertently define the Assembly's privileges. As discussed in this report's consideration of referrals, the Committee is supportive of an MOU defining the processes around claims of parliamentary privilege but does not believe that a statutory provision is required or desirable. The Committee is aware that the Speaker has in place an MOU with ACT Policing regarding the

¹²² *Submission 09*, Office of the Legislative Assembly, p. 11.

¹²³ Anti-Corruption and Integrity Commission Bill 2018, s 20(1)(d).

¹²⁴ *Submission 09*, Office of the Legislative Assembly, pp. 11-12.

execution of warrants within the Assembly precincts and is confident that the Speaker could make a similar arrangement with the Commission.

- 5.5 The Committee notes the concerns expressed by the Office of the Legislative Assembly about the definition of what is not a contempt in the Exposure Draft. The Committee understands the aim of the relevant provision but believes that a legal analysis should be sought and made public to clarify the effect of this and similar provisions in the *Public Interest Disclosure Act 2012* on the Assembly's privileges.

Recommendation 34

- 5.6 **The Committee recommends that the legislation state that where a matter of parliamentary privilege arises in the course of the exercise of the Commission's powers, it shall be dealt with by the Assembly.**

Recommendation 35

- 5.7 **The Committee recommends that the ACT Government obtain and publish a legal analysis on the impact s270(a)(iv) of the Exposure Draft, and similar provisions in the *Public Interest Disclosure Act 2012*, has on the Assembly's rights as regards s24(3) of the *Australian Capital Territory (Self Government) Act 1988*.**
- 5.8 The Office of the Legislative Assembly noted that the New South Wales Parliament amended its Integrity Commission legislation to make it clear that the commission could make use of the pecuniary register of members' interests in its investigations and reports.

COMMITTEE COMMENT

- 5.9 The Committee agrees that the register of members' interests should be available to the Commission to draw inferences and make findings in relation to corrupt conduct on the basis of the declaration or non-declaration of the interests of an MLA. The Committee notes the experience of the NSW Parliament in legislating a specific waiver to allow this. The Committee notes that the register is already public and is unclear if that is sufficient to permit the Commissioner to make use of it.

Recommendation 36

- 5.10 **The Committee recommends that the ACT Government explore whether specific provision needs to be made in the legislation to permit the Commissioner to make use of Members' declarations of interest.**

ADDRESSING CLAIMS OF PARLIAMENTARY PRIVILEGE

- 5.11 In its submission the Office of the Legislative Assembly noted that there were instances where the Commission, in using its powers to examine documents or witnesses, could face claims of parliamentary privilege. The submission provides extensive commentary on the issue and then proposes an independent arbitration process to determine claims of parliamentary privilege that arise during the exercise of the Commission's powers.¹²⁵
- 5.12 The Office of the Legislative Assembly submitted that:
- 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.¹²⁶
- 5.13 The Office also noted that by establishing this sort of process the Assembly can help preserve its exclusive jurisdiction and reduce the chance that the courts will see a role for themselves.¹²⁷
- 5.14 The ACT Government's submission also invited the Committee to consider the establishment of a process for claims of parliamentary privilege related to the Commission similar to that for claims of executive privilege before the Assembly.¹²⁸

COMMITTEE COMMENT

- 5.15 The Committee notes that the Assembly currently has in Standing Orders a process for an independent legal arbiter to determine claims of executive privilege.¹²⁹ The Office of the Legislative Assembly is proposing a similar process for addressing claims of parliamentary privilege that emerge during the course of the exercise of the Commission's powers. While the independent process for executive privilege is determinative, any independent process for claims of Assembly privilege should be advisory so as to preserve the prerogative of the Assembly to determine its privileges.

Recommendation 37

¹²⁵ *Submission 09*, Office of the Legislative Assembly, p. 12-19.

¹²⁶ *Submission 09*, Office of the Legislative Assembly, p. 12.

¹²⁷ *Proof Transcript of Evidence*, 24 September 2018, p. 38.

¹²⁸ *Submission 10*, ACT Government, p. 4.

¹²⁹ Standing Order 213A.

- 5.16 **The Committee recommends that the Standing Committee on Administration and Procedure consider the arrangements necessary for an independent process to advise on claims of parliamentary privilege that arise during Commission investigations and present a proposal to the Assembly.**

OTHER FORMS OF PRIVILEGE

- 5.17 The ACT Human Rights Commission raised concerns about provisions in the Bill preventing witnesses from relying on a variety of privileges to resist the exercise of the Integrity Commission's compulsion powers.¹³⁰ These privileges include privilege against self-incrimination, client legal privilege and public interest immunity.¹³¹ The Exposure Draft addresses such claims of privilege by having the Commission apply to the Supreme Court for determination of the claim.^{132 133}

- 5.18 The Committee asked Mr Coe for his views on the matter and he told the Committee that he thought that:

the key issue here, or the key distinction, is that because the integrity commission is not a court, because it is not making findings of guilt or innocence, because it is simply establishing facts, I do not think that the same judicial rules are required. I think that if we do go too far down that path of requiring a judicial standard for everything, you have actually defeated the whole purpose of having an investigation or an investigative body.

As I said before, yes, it could be abused, but that is why the role of the inspectorate is important and the role of the Assembly is important, as is the initial appointment. But if we create a bar that is pretty much on par with the Magistrates Court, how does this differ from the Magistrates Court? We might as well just have the current legislation.¹³⁴

COMMITTEE COMMENT

- 5.19 The Committee understands Mr Coe's intent of ensuring that the Commission does not get caught in ongoing legal claims designed to frustrate its work. It is important, however, to ensure that some basic protections remain in place. The Committee notes that there may be a "settling in" period where the Supreme Court is called upon to make a number of rulings in this area but expects this to taper off as questions about the Commission's powers are

¹³⁰ *Submission 07*, ACT Human Rights Commission, p. 3.

¹³¹ Anti-Corruption and Integrity Commission Bill 2018, s 48(2).

¹³² See for instance Integrity Commission Bill 2018 Exposure Draft, s160.

¹³³ The Committee notes that there was some confusion during public hearings as to whether these provisions applied to parliamentary privilege. The Committee is satisfied that the Exposure Draft is clear that they do not.

¹³⁴ *Proof Transcript of Evidence*, 21 September 2018, pp. 10-11.

resolved. The Committee is therefore comfortable with the approach on this issue taken in the Exposure Draft.

6 INVESTIGATIONS AND EXAMINATIONS

PUBLIC EXAMINATIONS

- 6.1 The original committee spent considerable time examining the pros and cons of public and private examinations. It recommended that the decision on whether to hold public or private examinations should be informed by a public interest test. This enabled a balance to be struck between avoiding undeserved reputational damage and the legitimate transparency, accountability and educative effects of public examinations.
- 6.2 The Bill states that examinations must be conducted in public unless the Commission decides that it is in the public interest to hold the examination in private.¹³⁵ Mr Coe confirmed that the Bill, similar to the New South Wales legislation, has public hearings as the default position.¹³⁶
- 6.3 The Exposure Draft states that examinations may be held in public or in private and sets out matters to be considered in determining which approach to take.¹³⁷ Officials noted that the drafting of the clause had to take into account the fact that the ACT is a human rights jurisdiction. The public interest in the public being aware of a matter was to be balanced against the reputation of participants.¹³⁸ The Chief Minister confirmed that the intent of the legislation is to leave the question of whether an examination is public or private to the Commissioner who must balance the competing interests in making a determination.¹³⁹
- 6.4 In its submission the CPSU advocated for a stronger public interest test proposing that the legislation “should ensure the conduct of a public examination is demonstrably in the public interest and outweighs any countervailing interests in confidentiality and privacy.”¹⁴⁰

COMMITTEE COMMENT

- 6.5 The Committee notes that a number of submitters expressed a view on whether most or all hearings should be public or private. The Committee is of the view that the legislation should be neutral as to whether a public or private examination should be conducted. The Committee is comfortable with clause 138 of the Exposure Draft as currently drafted, believing it gives the Commission an appropriate role in determining where the public interest lies. The Committee

¹³⁵ Anti-Corruption and Integrity Commission Bill 2018, s33.

¹³⁶ *Proof Transcript of Evidence*, 21 September 2018, p. 2.

¹³⁷ Integrity Commission Bill 2018 Exposure Draft, s138.

¹³⁸ *Proof Transcript of Evidence*, 28 September 2018, p. 64.

¹³⁹ *Proof Transcript of Evidence*, 28 September 2018, p. 64-65.

¹⁴⁰ *Submission 12*, CPSU, p. 3.

notes the assurances of the ACT Government on this point. The Committee believes that this approach should be reinforced in additional materials produced by the Government, such as the explanatory statement to the tabled bill. The Committee is not supportive of clause 139, which requires the Commission to notify the Inspector of its intention to hold a public examination with reasons, and this issue is discussed in the section of this report related to the Inspector.

LEGAL CHALLENGES

6.6 The Submission of the Assembly's Ethics and Integrity Adviser stated that under both the Bill and the Exposure Draft:

there is a very real risk that a commission decision to hold a public examination will be frustrated and either delayed or negated by legal challenge to the exercise of the discretion conferred either to hold a public hearing or not hold a private hearing. Under each of the Two Drafts, it is conceivable that the threat of legal challenge will effectively mean that, in practice, public examinations will be held only where the target of the allegations in question agrees.

The only way to avoid that prospect would seem to me to be to include provisions ousting the jurisdiction of the courts to review this class of decision. That would be a very significant step, but the Committee may nevertheless wish to give consideration to it.¹⁴¹

6.7 The Adviser expanded on this point before the Committee noting that there was a risk of creating "a lawyer's picnic". If the legislation is left unchanged:

the very real risk is that after a few challenges the commissioner is going to think: "Look, we need to get on with the job. It's just too difficult to spend potentially years caught up in legal challenge. Let's do it in private." I think that is the real risk. And I do not think I am alone in that view; I think some others might have put that to you.¹⁴²

6.8 Former NSW Auditor-General Tony Harris was supportive of ousting the jurisdiction of the courts in this area, believing it should be left to the Commissioner to determine.¹⁴³

6.9 The ACT Bar Association questioned whether there was a reason to single out that particular provision, as other provisions could equally be challenged through the courts.¹⁴⁴

¹⁴¹ *Submission 01*, Ethics and Integrity Adviser, p. 3.

¹⁴² *Proof Transcript of Evidence*, 24 September 2018, p. 28.

¹⁴³ *Proof Transcript of Evidence*, 24 September 2018, p. 22.

¹⁴⁴ *Proof Transcript of Evidence*, 24 September 2018, p. 46.

COMMITTEE COMMENT

- 6.10 While the Committee acknowledges the risks identified by the Ethics and Integrity Adviser, it does not believe that they are sufficient at this point to take the significant step of ousting the jurisdiction of the courts. If, after the Commission has been in operation for a period, the Commissioner finds that efforts to hold public hearings are being frustrated then the Assembly may wish to revisit these provisions.

COMMISSIONER TO PRESIDE

- 6.11 In his submission Mr Tony Harris noted that the Bill allows delegated officers to conduct examinations while the Exposure Draft requires all examinations to be conducted by the Commissioner.¹⁴⁵ Mr Harris said that the Commissioner should conduct public examinations as the Commissioner is required to have a certain skill set and “those higher level skills would be needed in public hearings where the atmosphere, the questions and the control of the hearings are much more important than in a private hearing.”¹⁴⁶ Allowing delegated officials to conduct private examinations may assist in alleviating the Commissioner’s workload.

COMMITTEE COMMENT

- 6.12 The Committee agrees with Clause 136 of the Exposure Draft that requires the Commissioner to preside at all examinations. The issue of Commissioner workload, and the possible need to alleviate it by amending the legislation to permit delegated officers to conduct private examination, is one that the relevant committee should keep under review.

GUIDELINES

- 6.13 In its submission the CPSU noted that the NSW legislation empowers the ICAC to issue guidelines about the conduct of public inquiries and suggested a similar provision may be of use in the Territory.¹⁴⁷

COMMITTEE COMMENT

- 6.14 The Committee believes that it would be of benefit both to the Commission and those who may become involved in its investigations for the Commission to have clear guidelines on its policies and procedures, including the conduct of examinations.

¹⁴⁵ *Submission 04*, A.C. Harris, p. 4.

¹⁴⁶ *Proof Transcript of Evidence*, 24 September 2018, p. 21.

¹⁴⁷ *Submission 12*, CPSU, p. 5.

Recommendation 38

- 6.15 **The Committee recommends that the legislation require the Commissioner to issue guidelines about the Commission's policies and procedures, and that the ACT Government consider whether the guidelines should be a notifiable instrument.**

INVESTIGATION POWERS, WARRANTS

PRELIMINARY INQUIRIES

- 6.16 The original committee recommend that the Commission have the power to conduct preliminary inquiries that do not include the use of coercive powers.¹⁴⁸ In its submission the CPSU noted that the Exposure Draft appears to run contrary to this recommendation and recommended that it be amended.¹⁴⁹
- 6.17 The Exposure Draft prohibits the Commissioner from using some of its coercive powers during preliminary inquiries¹⁵⁰ but does permit the issuing of a summons for documents.¹⁵¹
- 6.18 The Bill permits the Commission to use its powers to obtain information and power to obtain documents etc during preliminary inquiries but does not permit the issuing of a summons.¹⁵²

COMMITTEE COMMENT

- 6.19 The Committee prefers the drafting in the Bill. The majority of the Committee does not see a summons as appropriate for the preliminary inquiry stage. Preliminary inquiries are intended to inform the decision on whether or not to launch an investigation with coercive powers. Should the Commission find their efforts to obtain information during a preliminary inquiry frustrated by non-cooperation, that may serve as an indicator that a full investigation is desirable.

Recommendation 39

¹⁴⁸ *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, October 2017, p. 208.

¹⁴⁹ *Submission 12*, CPSU, p. 2.

¹⁵⁰ Integrity Commission Bill 2018 Exposure Draft, s83.

¹⁵¹ Integrity Commission Bill 2018 Exposure Draft, s85.

¹⁵² *Anti-corruption and Integrity Commission Bill 2018*, s17.

6.20 The majority of the Committee recommends that the legislation prohibit the use of summons in preliminary inquiries.¹⁵³

WITNESS ARREST WARRANTS

6.21 The submission of the ACT Human Rights Commission raised a number of issues around witness arrest warrants. It highlighted an apparent contradiction between provisions of the Exposure Draft regarding witness arrest warrants noting it:

includes a further important safeguard by requiring the witness to be brought before the commission *immediately* (s 157(3)(d)), or be released (s 157(4)). However, we note that s 157(3)(d) appears to be inconsistent with s 156(4), which states that the witness ‘must be brought before the commission *as soon as practicable*’ (emphasis added). We suggest that s 156(4) should be deleted to avoid any uncertainty with regard to the interaction of these provisions.¹⁵⁴

6.22 The submission goes on to say:

under s 156(3)(e)(ii), the magistrate is required to consider the impact of using a warrant for the arrest of the witness, and must take account of factors such as disability, health or cultural or linguistic background. However, we are concerned that the requirement is made contingent upon the magistrate first contacting the witness. A requirement to consider the likely impact of arrest on a witness before issuing a warrant is a significant safeguard that goes toward the proportionality of these powers. We can see no sound basis for qualifying the requirement in this way and recommend that it be removed.¹⁵⁵

6.23 The ACT Human Rights Commission also sought restrictions on the times arrest warrants could be served stating that the legislation should:

also specify that a police officer should not be authorised to enter residential premises to execute the warrant before 6 am or after 9 pm on any day, unless the officer believes on reasonable grounds that it would not be practicable to arrest the person at the premises or another location at another time.¹⁵⁶

COMMITTEE COMMENT

6.24 The Committee agrees with the Human Rights Commission that the witness arrest warrant provisions regarding bringing arrestees before the Commission should be amended for clarity

¹⁵³ Mrs Dunne and Ms Lee were of the view that the use of summons in preliminary inquiries should be permitted, as is the case with Assembly committees.

¹⁵⁴ *Submission 07*, ACT Human Rights Commission, p. 2.

¹⁵⁵ *Submission 07*, ACT Human Rights Commission, p. 2.

¹⁵⁶ *Submission 07*, ACT Human Rights Commission, p. 3.

but is uncertain if “immediately” is the correct standard. The Committee suggests that the timeframes and language in this section be consistent with arrest provisions in other pieces of ACT legislation.

- 6.25 The Committee agrees that 156(3)(e) would benefit from redrafting and would suggest that the phrase “if the magistrate has contacted the person” could be deleted and 156(3)(e)(i) and 156(3)(e)(ii) could become 156(3)(f) and 156(3)(g).
- 6.26 The Committee notes the views of the ACT Human Rights Commission on the execution of search warrants outside normal hours. The Committee discussed this issue and whilst it believes that the Commission should be reasonable in exercising warrants it does not see, at this point, a need for legislative restrictions.

Recommendation 40

- 6.27 The Committee recommends that the ACT Government re-examine the timeframes in the legislation under which persons arrested under an arrest warrant must be brought before the Commission to ensure consistency with the language and timeframes used in other relevant pieces of ACT legislation.**

Recommendation 41

- 6.28 The Committee recommends that s156(3)(e) of the Exposure Draft be redrafted by deleting the phrase “if the magistrate has contacted the person” and making s156(3)(e)(i) and s156(3)(e)(ii) into s156(3)(f) and s156(3)(g) respectively.**

COVERT POWERS

- 6.29 The original committee recommended that the Commission be able to apply for warrants to engage in covert tactics, including listening devices and optical surveillance.¹⁵⁷
- 6.30 In its submission the CPSU stated that:

The Exposure Draft does not appear to fulfil the Report’s recommendations regarding covert operations. The Exposure Draft amends the Crimes (Assumed Identities Act) 2009, Crimes (Controlled Operations) Act 2008, and the Crimes (Surveillance Devices) Act 2010 to allow Integrity Commission staff to be persons covered by those pieces of legislation and whom can apply to utilise the powers provided by those laws. The

¹⁵⁷ *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, October 2017, p. 222.

Integrity Commission does not need a judicial warrant to authorise a controlled operation or an assumed identity contrary to recommendations in the Report.

The CPSU genuinely questions whether covert tactics like undercover surveillance, false identities, or covert surveillance could be justified or necessary in the investigation of corrupt conduct by the Commission, given any report arising from an investigation does not make findings of guilt (clause 181) and makes recommendations. It is not the role of the Commission to collect evidence to prosecute offences. This can be contrasted to a law enforcement officer who is collecting evidence of a crime and who are currently able to apply for relevant covert tactics under the relevant legislation. CPSU members would be alarmed at the prospect a body like the Commission would be granted such extraordinary powers.¹⁵⁸

- 6.31 The ACT Ombudsman noted that he currently inspects the records of ACT Policing pertaining to the use of covert powers. The Exposure Draft would extend his inspections to cover the Commission and it is likely that he would conduct 12 monthly inspections of the Commission.¹⁵⁹

COMMITTEE COMMENT

- 6.32 The Committee notes the concerns of the CPSU in this area but, given the nature of corruption, the Committee believes that covert powers may be required to adequately investigate corrupt conduct. The Committee defers to the safeguards in the relevant legislation combined with the Inspector's oversight powers.¹⁶⁰

DRAFT INVESTIGATION REPORTS

- 6.33 In its submission the CPSU noted

clause 186 of the Exposure Draft which provides for a relevant person or a public sector entity to be provided a copy of the proposed investigation report to comment upon prior to presentation to the legislative assembly. The CPSU is concerned that this requirement for consultation not be imposed in all circumstances. Instead the Commission should have the discretion not to provide the report where it would not be in the public interest or the interest of persons concerned.¹⁶¹

- 6.34 Following questions during public hearings the CPSU elaborated:

¹⁵⁸ *Submission 12*, CPSU, p. 3.

¹⁵⁹ *Submission 06*, ACT Ombudsman, p. 3.

¹⁶⁰ Ms Cody raised concern about the use of covert powers as, in her view, they are often not exercised in accordance with their governing legislation.

¹⁶¹ *Submission 12*, CPSU, p. 5.

For example, a draft report's release to agencies or persons concerned could provide opportunity for certain persons to act unscrupulously prior to the reports public release or any disciplinary or police involvement. For high profile reports it could encourage rumour, speculation or unauthorised release. The Commission should have the discretion not to provide the investigation report for comment to agencies or other persons where it would not be in the public interest or the interest of persons concerned.¹⁶²

COMMITTEE COMMENT

- 6.35 The Committee believes that persons being investigated should be given the opportunity to review the relevant material prior to the publication of a report. The Committee notes that provisions similar to those in the Exposure Draft appear in the *Auditor-General Act 1996*.¹⁶³ The Committee is concerned, however, that there may be limited circumstances where sharing a proposed investigation report could be prejudicial to any subsequent prosecution. The Committee believes that the Commission needs to have the discretion to withhold the proposed report in such circumstances.

Recommendation 42

- 6.36 **The Committee recommends that s186 of the Exposure Draft be amended to give the Commission the discretion to withhold a proposed investigation report from a relevant entity if there are reasonable grounds to believe that the sharing of the proposed investigation report could prejudice a prosecutorial or serious disciplinary action.**

USE AND DERIVATIVE USE OF EVIDENCE

- 6.37 Both the Bill and the Exposure Draft give the Commission the power in certain circumstances to gather information by using compulsion powers that override some traditional protections, such as the privilege against self-incrimination. The two pieces of draft legislation treat slightly differently what use can subsequently be made of such information as evidence in court proceedings. The Bill prevents information obtained either directly or indirectly through the use of compulsion from being admissible as evidence in subsequent proceedings.¹⁶⁴ The Exposure Draft places the same restrictions on the use of information directly obtained with the use of compulsion powers. For information indirectly obtained with the use of compulsion

¹⁶² CPSU response to questions taken on notice: Select Committee on Independent Integrity Commission 2018.

¹⁶³ *Auditor-General Act 1996*, s18.

¹⁶⁴ *Anti-corruption and Integrity Commission Bill 2018*, s46(3).

powers, the Exposure Draft prevents its use except where the information could be obtained, or its significance appreciated, without the use of compulsion powers.¹⁶⁵

6.38 The ACT Bar Association summed up the differences between the two pieces of draft legislation as follows:

Clearly, the derivative use immunity proposed in the Bill gives a greater protection to individuals compelled to give evidence before the Commission. The proposal in the Exposure Draft is a compromise position that will facilitate proof of criminal offending whilst giving some limited derivative use protection.¹⁶⁶

6.39 The ACT Bar Association also noted concerns expressed in other jurisdictions about integrity bodies gathering evidence in ways that did not maximise the possibility of it being able to be used in subsequent court proceedings.¹⁶⁷

6.40 Tony Harris told the Committee that:

There were some issues raised recently about an obligation to provide evidence—in other words, even if it might be self-incriminating, as it were. I think that is important. We already have a number of institutions where you are obliged to provide evidence, although not in public and not in the way that is envisaged in this case. That evidence cannot be used against you. In the royal commission at the moment, for example, you are obliged to answer questions fully and accurately, even though it might lead to the fact that the commissioner says you may have committed a criminal offence from your own testimony. That testimony cannot be used against you.

It is much more important to me that the public understand the facts of the issue than that a person is successfully prosecuted. The findings that a commission makes are fundamentally important to democracy, in my view, and they are much more important than that a particular person would later escape prosecution because they cannot have that evidence used against them.¹⁶⁸

6.41 In response to these comments the ACT Bar Association told the Committee that they:

do not say the finding of corrupt conduct is without substance or meaning—to the contrary. But if you are looking at a complete package, where the ultimate intention would be to prosecute people who have breached the law and where the evidence in relation to that has come out of a commission process, then you want to be able to maximise your chances of securing a conviction. That is all we are saying.¹⁶⁹

¹⁶⁵ Integrity Commission Bill 2018 Exposure Draft, s175.

¹⁶⁶ *Submission 14*, ACT Bar Association, p. 6.

¹⁶⁷ *Submission 14*, ACT Bar Association, p. 7.

¹⁶⁸ *Proof Transcript of Evidence*, 24 September 2018, pp. 20-21.

¹⁶⁹ *Proof Transcript of Evidence*, 24 September 2018, pp. 44-45.

COMMITTEE COMMENT

- 6.42 The Committee prefers the Exposure Draft's approach in this area as it does not needlessly exclude possible evidence from subsequent proceedings. As regards the manner of gathering evidence in order to maximise possible future action the Committee believes that this is a balancing exercise that the Commissioner should undertake on a case by case basis. It is clearly preferable that information be obtained in way that preserves its ability to be used as evidence where possible, and indeed such an approach is consistent with the Commissioner only making use of powers of compulsion where there is no other practical means of obtaining information. There may be occasions, however, where determining the facts of corrupt conduct requires gathering information in a manner that will make it inadmissible in any subsequent proceedings.

OBSTRUCTION OF THE COMMISSION AND INSPECTOR

- 6.43 Part 9 of the New South Wales *Independent Commission Against Corruption Act 1988* sets out a series of offences against the Commission. Both the Exposure Draft and the Bill outline some of the offences in this part but not all of them.
- 6.44 Specifically section 80 of the NSW Act addresses obstruction of the Commissioner, Inspector and others as follows:
- A person shall not:
- (a) without reasonable excuse, wilfully obstruct, hinder, resist or threaten:
 - (i) the Commission or an officer of the Commission in the exercise of functions under this Act, or
 - (ii) the Inspector or an officer of the Inspector in the exercise of functions under this Act, or
 - (iii) an Australian legal practitioner appointed by the Commission to assist the Commission as counsel in the exercise of functions as such counsel, or
 - (iv) an Australian legal practitioner or other person authorised to appear before the Commission in relation to that appearance, or
 - (b) without reasonable excuse, refuse or wilfully fail to comply with any lawful requirement of the Commission or an officer of the Commission, or the Inspector or an officer of the Inspector, under this Act, or
 - (c) wilfully make any false statement to or mislead, or attempt to mislead, the Commission or an officer of the Commission, or the Inspector or an officer of the Inspector, in the exercise of functions under this Act, or
 - (d) disrupt a compulsory examination or public inquiry before the Commission.
- Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

- 6.45 The Bill creates an offence of contempt of Commission¹⁷⁰ and an offence of failing to comply with a requirement.¹⁷¹
- 6.46 The Exposure Draft sets out what comprises a contempt of the Commission,¹⁷² but requires the Commission to apply to the Supreme Court to deal with contempt.¹⁷³ The Supreme Court then deals with the contempt as if it were a contempt of the court.¹⁷⁴ Under the Exposure Draft an investigator may require someone to help an investigator exercise their powers on entry to a premises and it is an offence for that person to fail to take all reasonable steps to comply.¹⁷⁵ The Exposure Draft largely deals with possible obstruction by applying Chapter 7 of the *Criminal Code 2002*, which deals with administration of justice offences, to preliminary inquiries and examinations.¹⁷⁶
- 6.47 The NSW Act also outlines other offences such as bribery of the Commission and interfering with witnesses.

COMMITTEE COMMENT

- 6.48 The Committee notes the various provisions in the Exposure Draft intended to prevent obstruction of the Commission in its work. The Committee believes, however, that a general offence provision similar to that used in New South Wales, is appropriate for ensuring that the Commission is free to conduct its work.

Recommendation 43

- 6.49 **The Committee recommends that the legislation be amended to include a general offence of obstructing the Commissioner, Inspector, their staff and witnesses, similar to Part 9 of New South Wales *Independent Commission Against Corruption Act 1988*.**

¹⁷⁰ *Anti-corruption and Integrity Commission Bill 2018*, s51.

¹⁷¹ *Anti-corruption and Integrity Commission Bill 2018*, s70.

¹⁷² *Integrity Commission Bill 2018 Exposure Draft*, s164.

¹⁷³ *Integrity Commission Bill 2018 Exposure Draft*, s165.

¹⁷⁴ *Integrity Commission Bill 2018 Exposure Draft*, s167.

¹⁷⁵ *Integrity Commission Bill 2018 Exposure Draft*, s115.

¹⁷⁶ *Integrity Commission Bill 2018 Exposure Draft*, s96, s172.

7 OVERSIGHT OF THE COMMISSION

FUNCTIONS AND POWERS OF THE INSPECTOR

7.1 The original committee recommended that:

a part-time Inspector be appointed to: (a) provide oversight as it concerns complaints relating to any aspect of [the Commission's] operations or any conduct of its officers; and (b) to conduct a review of the operations (in the form of monitoring, review and report) of [the Commission] at a minimum every 12 months.¹⁷⁷

7.2 The Bill and the Exposure Draft have broadly similar provisions relating to the Inspector with some distinctions. Under the Exposure Draft role the Inspector is an Officer of the Assembly. The Exposure Draft contains various provisions where the use of certain powers trigger requirements to inform the Inspector and provide reasons for the use of the power.¹⁷⁸

COMMITTEE COMMENT

7.3 The Committee believes that the Exposure Draft lacks a clear statement of the Inspector's powers. Section 221 of the Exposure Draft sets out the functions of the Inspector and part 5.4 contains various powers to be used in relation to complaints about the Commission, including the power to conduct own initiative investigations.¹⁷⁹ The Committee notes that s57 of New South Wales' *Independent Commission Against Corruption Act 1988* states that the Inspector:

- (a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and
- (b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and
- (c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and
- (d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and

¹⁷⁷ *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, October 2017, p. 262.

¹⁷⁸ See, for example, Integrity Commission Bill 2018 Exposure Draft, s79, s114, s192.

¹⁷⁹ Integrity Commission Bill 2018 Exposure Draft, s252.

(e) may investigate and assess complaints about the Commission or officers of the Commission, and

(f) may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and

(g) may recommend disciplinary action or criminal prosecution against officers of the Commission.

- 7.4 The Committee believes that a general statement of the Inspector's powers, rather than an approach of tying powers specifically to a complaints process, is the appropriate approach to take to ensure that the oversight role is conducted effectively. The Committee acknowledges that the approach taken in the Exposure Draft may largely contain the same powers but believes that the drafting approach taken in the NSW legislation provides greater clarity.

Recommendation 44

- 7.5 **The Committee recommends that the ACT Government amend the Exposure Draft to contain a clear statement of the Inspector's powers in a similar manner as s57 of New South Wales' *Independent Commission Against Corruption Act 1988*.**

COMMISSION NOTIFICATIONS TO THE INSPECTOR

- 7.6 The Exposure Draft contains a number of provisions where the Commission must report the use of its powers, and provide reasons for that use.¹⁸⁰ For example s139 states that:

If the commission intends to hold a public examination, the commission must, not less than 7 days before the day of the public examination, give a written report to the inspector stating—

- (a) that the commission intends to hold a public examination; and
- (b) the reasons why the commission decided to hold a public examination.

- 7.7 The Committee views the Inspector as having a powerful oversight role of the Commission's operations rather than a day to day involvement in the Commission's processes. The Committee did not envisage the legislation containing the kind of provisions described above. The requirement to report 7 days prior to a public examination with reasons appears to invite the Inspector to intervene if they disagree with the Commissioner's decision. The Committee is of that view that such provisions should be removed from the legislation as they are unnecessary if the Inspector's broad powers are stated as recommended above.

¹⁸⁰ Integrity Commission Bill 2018 Exposure Draft, s79, s87, s139, s144, s155, s158, s166, s192.

Recommendation 45

- 7.8 The Committee recommends that the ACT Government remove any provisions from the legislation that require automatic reporting of the Commission's use of its powers to the Inspector, including sections 79, 87, 139, 144, 155, 158, 166 and 192.**

ELIGIBILITY TO BE THE INSPECTOR

- 7.9 In his submission the ACT Ombudsman, referring to the Exposure Draft, stated that:

The Bill establishes the position of Inspector of the Commission. While the Bill provides for appointment of a former judge to this position, it also envisages that the Speaker may make arrangements for another person who already performs similar functions to carry out that role (clause 236(2)).

The Bill as currently drafted requires the Inspector's staff to be ACT public servants employed under the Public Sector Management Act 1994 (clause 238). I suggest that an amendment be made so that if an arrangement is made with a person to carry out the role of Inspector under clause 236, that person would be able to engage staff under their own governing legislation.¹⁸¹

- 7.10 At a public hearing the Acting ACT Ombudsman elaborated:

We see that we have similar oversight functions to the ones that would be undertaken by the inspector. At the moment we currently do inspecting roles in relation to various covert powers, both in our ACT Ombudsman role and in our commonwealth Ombudsman role. We also oversight complaints mechanisms, both in our ACT Ombudsman role and our commonwealth Ombudsman role. So we see some synergies there.

We are also conscious of the fact that, in a smaller jurisdiction like the ACT, establishing yet another oversight inspectorate role, which would be quite a small role as compared to the integrity role, it may be of benefit for the ACT to be able to pick up an existing oversight function to do that. We see that we would be in a position to do that.¹⁸²

COMMITTEE COMMENT

- 7.11 The Committee notes the offer by the Ombudsman to take on the role of Inspector and notes that the Exposure Draft makes this possible under s236. The Committee supports the recommendation to change the requirement that inspectorate staff be employed under ACT

¹⁸¹ *Submission 06*, ACT Ombudsman, p. 3.

¹⁸² *Proof Transcript of Evidence*, 24 September 2018, p. 14.

legislation in order to permit the Ombudsman to perform the role of Inspector should the Speaker so choose.

- 7.12 The Committee notes that the Exposure Draft sets out detailed consultation and approval procedures for the appointment of the Inspector but no such procedures if the Speaker opts to make arrangements under s236 for a person exercising similar functions under a Commonwealth or State law to perform the role of Inspector. The Committee believes that this should be rectified to require consultation and a 2/3 majority resolution in the Assembly.

Recommendation 46

- 7.13 **The Committee recommends that the legislation omit reference to any requirement that inspectorate staff be employed by the Territory or under Territory law to enable a Commonwealth agency to be appointed as Inspector if so chosen.**

Recommendation 47

- 7.14 **The Committee recommends that the legislation be amended so that any exercise by the Speaker of the power under s236(2) to make arrangements for another person to exercise the functions of the Inspector be subject to the consultation and Assembly resolution requirements of s222(2)(a) and s222(3)(b).**

INSPECTOR RECOMMENDING THE APPOINTMENT OF AN ACTING COMMISSIONER

- 7.15 The Assembly's Ethics and Integrity Adviser highlighted clause 260 of the Exposure Draft which permits the Inspector to recommend that appointment of an acting commissioner to investigate complaints about the Commissioner or the Commission. The adviser suggested this clause was unnecessary.¹⁸³

COMMITTEE COMMENT

- 7.16 The Committee notes that the Inspector has significant powers under the Exposure Draft to investigate and compel the cooperation of Commission staff. Provision to recommend an Acting Commissioner be appointed to investigate the Commission, the very purpose of the Inspector, appears circular and unnecessary.

Recommendation 48

¹⁸³ *Submission 01*, ACT Legislative Assembly Ethics and Integrity Adviser, p. 3.

- 7.17 The Committee recommends that the legislation be amended by deleting s260 of the Exposure Draft, removing the power of the Inspector to recommend that an acting Commissioner be appointed.**
- 7.18 The submission of the Office of the Legislative Assembly proposed that a register of conflicts of interest be maintained by the Commission and available to the Inspector. The Inspector would report to the relevant Assembly Committee on how the Commission was managing conflicts of interest. The Office said that 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.¹⁸⁴

COMMITTEE COMMENT

- 7.19 The Committee agrees that, given the nature of the Commission's work, a heightened level of scrutiny of possible conflicts of interest is appropriate and the proposal of the Office of the Legislative Assembly strikes the right balance between privacy and oversight.

Recommendation 49

- 7.20 The Committee recommends that the Commissioner be required to maintain a register of conflicts of interest and any steps taken to manage them within the Commission and that the register be available to the Inspector.**

Recommendation 50

- 7.21 The Committee recommends that the Inspector report to the relevant Assembly committee on the extent to which the Commission is managing conflicts of interest.**

THE ASSEMBLY

- 7.22 The original committee recommended that a relevant Assembly standing committee have a broad oversight role and broad mandate to monitor and report on the performance and functions of the Commission.¹⁸⁵ Both the Bill and the Exposure Draft provide for such a role.

¹⁸⁴ *Submission 09*, Office of the Legislative Assembly, p. 21.

¹⁸⁵ *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, October 2017, p. 261.

COMMITTEE COMMENT

- 7.23 The Committee considered whether any of the current Standing Committees would be appropriate as the oversight committee for the Commission. The Committee considered the Standing Committees on Public Accounts; Administration and Procedure; and Justice and Community Safety but did not feel that any of them had the correct combination of capacity and cross-party representation to fulfil the role. The Committee is therefore recommending that a dedicated Committee be established.
- 7.24 The Committee also notes references in the Exposure Draft to consultation with, or the provision of information to, the presiding member of the relevant committee.¹⁸⁶ It has not been the practice of the Assembly for the Chairs of committees to fulfil such roles and the Committee believes that any such requirements should be directed at the committee not the chair.

Recommendation 51

- 7.25 **The Committee recommends that the Assembly establish a dedicated committee with oversight of the Commission.**

Recommendation 52

- 7.26 **The Committee recommends that the legislation be amended to replace references to the “presiding member of the relevant Assembly committee” with “the relevant Assembly committee”.**

¹⁸⁶ Integrity Commission Bill 2018 Exposure Draft, s38(1), s190(3)-(4), s212(3)-(4), s235(1).

8 THE INTEGRITY FRAMEWORK

8.1 The Exposure Draft states that one of the functions of the Commission is to “foster public confidence in, and to give leadership to, the Legislative Assembly and public sector”.¹⁸⁷ In exercising its functions the Commission must “take into account the responsibility and role other public sector entities have in the prevention of corrupt conduct”.¹⁸⁸ Part 2.5 of the Exposure Draft sets out processes for cooperating with other entities.

8.2 In its submission the Office of the Legislative Assembly stated that 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.¹⁸⁹

COMMITTEE COMMENT

8.3 The Committee views the Commission as being the paramount body for dealing with integrity issues within the Territory. That does not mean, however, that the Commission must become the clearing house for all integrity issues. The Committee believes that a cooperative approach and sensible use of referral powers and memoranda of understanding with other integrity bodies should ensure a comprehensive integrity framework within the Territory.

8.4 The Committee agrees that “leadership” is the wrong term to describe the Commission’s role with the Legislative Assembly.

Recommendation 53

8.5 The Committee recommends that the legislation be amended to remove reference in s23(1)(f) to the Commission providing leadership to the Legislative Assembly.

COOPERATION BETWEEN AGENCIES

8.6 The Exposure Draft states that “The commission and public sector agencies are to work cooperatively” and requires the Commission to liaise with the public sector and non-Territorial

¹⁸⁷ Integrity Commission Bill 2018 Exposure Draft, s23(1)(f).

¹⁸⁸ Integrity Commission Bill 2018 Exposure Draft, s23(4).

¹⁸⁹ *Submission 09*, Office of the Legislative Assembly, p. 24.

entities and avoid needless duplication of work.¹⁹⁰ The Commission is empowered to enter into memoranda of understanding with other entities to manage interaction.¹⁹¹

8.7 The ACT Audit Office highlighted the above provisions and stated that:

The Audit Office works with all public sector entities to deliver its functions. However, this is done in an independent manner without explicit collaboration. Being independent is paramount to achieving the functions of the Auditor-General when reporting to the ACT Legislative Assembly. The Audit Office would anticipate a similar approach when working with the Commission, one which is based on effective communication. As such, the Audit Office notes that it is not willing to commit to developing a memorandum of understanding or agreement with the Commission.¹⁹²

8.8 The ACT Audit Office highlighted clauses 104(2) and 105(3) of the Exposure Draft, which due to an apparent typographical error bound the Audit Office.

COMMITTEE COMMENT

8.9 The Committee sees nothing in the above provisions that impinge upon the Auditor-General's independence. Authorising the Commission to enter into MOUs does not compel the Audit Office to agree to one, although the Committee notes that a mutually agreed MOU is entirely possible between two independent agencies.

8.10 The Committee notes that the ACT Government reissued the Exposure Draft on 28 August 2018 to correct the typographical errors.

PUBLIC INTEREST DISCLOSURE ACT

8.11 The original committee recommended that the *Public Interest Disclosure Act 2012* (the PID Act) be subject to an independent review that considered, amongst other things, the interaction between the PID Act and an integrity commission.¹⁹³ In its response the ACT Government agreed to this recommendation¹⁹⁴ but the review has not yet commenced.

8.12 When asked how the Bill addressed the PID Act Mr Coe said he thought that the PID has "all sorts of issues with it" and he has not tried to fix those in this Bill. He noted that, given the

¹⁹⁰ Integrity Commission Bill 2018 Exposure Draft, s53 .

¹⁹¹ Integrity Commission Bill 2018 Exposure Draft, s54.

¹⁹² *Submission 05*, ACT Audit Office, p. 2.

¹⁹³ *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, October 2017, p. 275.

¹⁹⁴ *Government Response to Select Committee's Report: Inquiry into an Independent Integrity Commission*, 20 March 2018, p. 275.

problems with the PID Act, he did not think that the integrity legislation should necessarily be recognising the boundary in the PID Act as the appropriate boundary.¹⁹⁵

- 8.13 Officials told the Committee that the PID Act requires disclosure officers to report the disclosure to the head of agency and potentially the head of service and ombudsman, and that this forms part of the anti-corruption framework.¹⁹⁶ The Exposure Draft adds the integrity commissioner to the PID Act as a disclosure officer but otherwise leaves the system unchanged.

COMMITTEE COMMENT

- 8.14 The Committee supports the consequential amendments to the PID Act that include the Commissioner but believes that a holistic review is required. There are various aspects of the Act that should be reviewed but the Committee notes that the establishment of the Commission raises the question of whether the structure of public interest disclosures should be reviewed from first principles.

Recommendation 54

- 8.15 **The Committee recommends that the ACT Government establish a comprehensive review of the *Public Interest Disclosure Act 2012* as soon as is possible with the aim of having changes implemented by 2020.**

EDUCATION

- 8.16 The Exposure Draft states that one of the functions of the Commission is to:
- provide education programs about the operation of this Act and the commission, including providing advice, training and education services to—
- (i) the Legislative Assembly and the public sector to increase capacity to prevent corrupt conduct; and
 - (ii) the community about the detrimental effects of corruption on public administration and ways in which to assist in preventing corrupt conduct¹⁹⁷

¹⁹⁵ *Proof Transcript of Evidence*, 21 September 2018, p. 7.

¹⁹⁶ *Proof Transcript of Evidence*, 21 September 2018, p. 69.

¹⁹⁷ Integrity Commission Bill 2018 Exposure Draft, s23(1)(e).

COMMITTEE COMMENT

- 8.17 The Committee notes that the draft legislation, and subsequently this report, devotes relatively little space to the educative function of the Commission. This is because the Commission can carry out its functions in this area without substantial legislative provisions, in contrast to its investigative functions. The Committee wishes to note, however, that it considers the Commission's educative role to be a vital function. Investigating potential corrupt conduct is very important but the Commission could potentially have a greater impact on the Territory by preventing corrupt conduct through the provision of training and education services.

9 CONCLUSION

- 9.1 The Committee has made 57 recommendations in this report both to the Assembly and to the ACT Government.
- 9.2 The Committee again thanks all those who contributed to this inquiry and looks forward to the Assembly working together to pass this important piece of legislation.

Shane Rattenbury MLA

Chair

30 October 2018

APPENDIX A - WITNESSES

21 SEPTEMBER 2018

- Mr Alistair Coe MLA, Leader of the Opposition.

24 SEPTEMBER 2018

- Ms Jaala Hinchcliffe, Acting ACT Ombudsman;
- Mr Tony Harris;
- Mr Stephen Skehill, Ethics and Integrity Adviser
- Mr Tom Duncan, Clerk
- Mr David Skinner, Director, Office of the Clerk
- Mr Ken Archer, immediate past President, ACT Bar Association

28 SEPTEMBER 2018

- Ms Brooke Muscat-Bentley, ACT Regional Secretary, CPSU
- Mr Brenton Higgins, Lead Organiser, ACT Government, CPSU
- Mr Andrew Barr MLA, Chief Minister
- Ms Meredith Whitten, Deputy Director-General, Workplace Capacity and Governance – CMTEDD
- Ms Kathy Leigh, Head of Service, Director General, CMTEDD
- Mr Richard Glenn, Deputy Director General, Justice, JACS

APPENDIX B - SUBMISSIONS

| Submission Number | Submitter | Received |
|-------------------|--|-----------|
| 1 | Stephen Skehill | 23-Aug-18 |
| 2 | Hannah Aulby | 24-Aug-18 |
| 3 | Lady Nora Preston | 26-Aug-18 |
| 4 | Tony Harris | 27-Aug-18 |
| 5 | ACT Audit Office | 28-Aug-18 |
| 6 | ACT Ombudsman | 31-Aug-18 |
| 7 | Human Rights Commission | 31-Aug-18 |
| 8 | ACT Public Sector Standards Commissioner | 31-Aug-18 |
| 9 | OLA | 31-Aug-18 |
| 10 | ACT Government | 31-Aug-18 |
| 11 | Science Party | 02-Sep-18 |
| 12 | CPSU | 31-Aug-18 |
| 13 | AFP and ACT Policing | 03-Sep-18 |
| 14 | ACT Bar Association | 04-Sep-18 |
| 15 | ACT Law Society | 05-Sep-18 |