



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON AN INDEPENDENT
INTEGRITY COMMISSION 2018

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

Submission Cover Sheet

Inquiry into an Independent Integrity Commission 2018

Submission Number: 04

Date Authorised for Publication: 4 September 2018

[REDACTED]
Narrabundah ACT 2604
[REDACTED]

27 august 2018

Mr Hamish Finlay
Manager
Committee Support Office
Select Committee on an Independent Integrity Commission 2018
committee@parliament.act.gov.au

Dear Mr Finlay

Please find below a submission to the above-mentioned committee.

Yours sincerely

A C Harris

Submission to the Select Committee on an Independent Integrity Commission 2018

Introduction

This submission examines selected features of each of the two, tabled Bills concerning an Independent Integrity Commission for the ACT. It attempts to identify noteworthy differences between the two Bills and some matters that should be modified in order to obtain an optimum outcome.

It adopts the Bill tabled by the Chief Minister (the Barr Bill) as the default legislation, in part because it is the more exhaustive of the presented Bills.

Definition of Corrupt Conduct

The Barr Bill definition of corrupt conduct places useful emphasis on behaviour that adversely affects public confidence. In many ways, this non-technical concept accurately captures the essence of a successful anti-corruption Act. It confronts the lack of confidence in the community about politics and politicians.

The Barr and Coe Bills also acknowledge that corrupt acts extend well beyond acts currently classed as criminal.

The Coe 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.

The Coe Bill clearly applies the Act to all persons, including non-public entities, whose actions adversely affect the impartial exercise of public functions – an important feature. The Barr Bill definition of corrupt behaviour seemingly applies equally to all relevant persons in the ACT.

The Coe Bill requires that the definition of corrupt conduct applying to each of the Ministerial and Legislative Member groups be specified in a separate code. The advantage of this approach is that such codes can reflect the particular responsibilities applying to each group. The disadvantage is that there will be no corrupt conduct – outside of criminal behaviour – until the codes are proclaimed. (In *Greiner v The ICAC*, the majority of the NSW Appeals Court held that the ICAC finding of corruption should be set aside for, in effect, the lack of a code of conduct applying to the NSW Ministry. It took several years for the NSW Parliament to settle such a code. See Allars, Margaret: *In Search of Legal Objective Standards: The Meaning of Greiner versus the Independent Commission Against Corruption*”.)

Definition of Public Officials

There are several differences in defining public officials between the two Bills. The Coe Bill includes Judges and other “judicial” officers (but allows non-judges who have legal experience to be the Commissioner making corruption judgements). The Barr Bill excludes such judicial officials from the Bill (but requires the Commissioner to have been a judge). This submission merely notes that it is common to exclude judicial officers from such legislation because these officers are typically covered by separate legislation. The qualities of the Commissioner are discussed below.

The Barr Bill excludes the Commissioner, the Inspector and relevant staff from those subject to the Commission’s examinations. It thus avoids or reduces the potential for conflict of interest. But it causes a difficulty when there is suspected corruption in those groups. The Coe Bill does not allow that exclusion.

Importantly, each Bill includes ACT police officers, with some exemptions.

Selection of Commissioner and Staff

The Barr Bill clauses for the means to select a Commissioner and Inspector are “best in class”. They reflect the importance of the positions. However, the requirement that the Commissioner and Inspector have been a judge precludes a large group of non-judges who have been qualified sufficiently to be appointed Royal Commissioners or Directors of Public Prosecutions. To allow the appointment of such officers, and to tighten up the qualities required by the Coe Bill, lawyers with an SC or QC should be allowed as candidates.

Corruption Notification Requirements

Each Bill allows any person to notify suspected corruption but each requires heads of agencies (and, in the Coe Bill, Ministers and, in the Barr Bill, Assembly Members and Assembly staff) to notify the Commission of suspected corruption, though the Barr Bill exempts some office holders such as the Auditor-General. Such exemptions are unnecessary and weaken the Act.

The Coe Bill provides that it is a crime not to refer suspected corruption to the Commission when there is an obligation to do so.

These issues – who is required to notify and the consequences of non-notification - have a major influence on the success of this kind of legislation.

It is debateable as to why NSW with a stringent ICAC Act encountered so much corruption as to lead to the imprisonment of a number of officials - including ministers. In my knowledge, some officials knew of some of the corrupt activity but chose not to advise the ICAC until this was done anonymously.

One arguable factor for the serious corruption in NSW might be the lack of tenure of senior public servants. In NSW, Ministers may dismiss SES officers for no reason at any time, and such dismissed officers have no right to receive salaries for the balance of the contract. Such exposure to dismissal and the absence of a capacity to recover damages together with the lack of any penalty for non-notification makes non-notification an attractive option.

Imposing a requirement only on agency heads (and some others) is to weaken the proposed Commission. Widening such a requirement to all SES and equivalent officials in the public sector would improve the Bills.

Imposing a penalty for non-referral, as proposed in the Coe Bill, would also improve the Commission's effectiveness.

Both Bills allow the Commission to investigate on its own motion. The Coe Bill gives an Assembly referral a legal but non-binding and uncertain force. (The Assembly can, with a majority of members, pass an Act requiring the Commission to investigate.)

Public Examination

Both Bills allow public examination. The difference is in emphasis. The Coe Bill sees public examination as the default option. The Barr Bill allows it when a public examination is in the public interest **and** does not unreasonably infringe human rights. If a public hearing unreasonably impacts on human rights, that trumps the public interest and there can be no public examination.

The same concern for human rights/reputational matters is not evident in the requirement that nearly all Court hearings are public. And while legal representation is provided where there are public examinations in the Commission, that is not necessarily so for Court proceedings.

The Barr Bill requires all examinations to be conducted by the Commissioner. The Coe Bill provides for delegated officers. It might be appropriate that all public examinations be conducted by a Commissioner but to allow delegated officers to conduct private examinations.

Defamation and Detriment

Although it is likely that privilege would apply to someone making a referral or notification that is defamatory, the Coe Bill usefully provides legislative protection from defamation proceedings. This protection should be limited to notifications that are not malicious.

The Coe Bill allows a person who has suffered a detriment because the person made a notification to recover damages. This is a useful protection both to help ensure the making of a notification and to remedy a detriment. All available

research shows that whistle-blowers suffer substantially because of their actions.

Financing

It has become evident, in NSW at least, that governments have been able to circumscribe the activities of these commissions by providing an inadequate annual provision.

It is now best practice that accountability agencies should not be reliant on the financial provisions set by the government. To help eliminate the consequences of conflicts of interest, it is becoming more common for these provisions to be set by the legislative committee that oversees the commission.

Conclusion

The Coe and the Barr Bills provide a sound basis for progressing an Act to provide for an Independent Integrity Commission. There are several issues the Committee can examine and recommend in order to ensure that the Barr Bill reflects best practice..

A C Harris
27 August 2018