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The Secretary
Select Committee on an Independent Integrity Commission
Legislative Assembly for the ACT
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Dear Sirs

We attach a copy of our submission to the Select Committee on an Independent Integrity Commission. We appreciate the opportunity of meeting with the Committee and the additional time we were given to prepare this submission.

Kind regards

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Submission to ACT Legislative Assembly Select Committee on an Independent Integrity Commission

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In making this submission, we draw on our earlier work on non-departmental agencies generally (esp. Aulich & Wettenhall 2012), and particularly on 'integrity agencies' as a special class of such agencies (Aulich, Wettenhall & Evans 2012). As part of this work we have made submissions to previous ACT Legislative Assembly committee inquiries examining issues which we regard as relevant to the present inquiry, notably on legislation governing the operations of the Auditor-General's Office and the Electoral Commission, and on the case for appointing a special group of 'officers of parliament'[1].

This present Committee was appointed in the context of much contemporary discussion about the reconstituting of the NSW ICAC (Independent Commission Against Corruption) and the desirability of extending this sort of anti-corruption cover to all Australian jurisdictions. As the *Issues Paper* issued prior to the Committee meetings indicated (Legislative Assembly 2017), bodies with anti-corruption functions, some modelled more-or-less on the NSW example, now operate in all other Australian states, and at federal level the Senate currently has a committee inquiring into the possible creation of a similar body for the Commonwealth jurisdiction.

Many anti-corruption agencies are established in haste as a result of some scandal or report on corrupt behaviours that threaten the overall integrity of a particular jurisdiction. It is an advantage that the Select Committee's remit has not been prompted by events of the magnitude of, say, the Fitzgerald enquiry in Queensland and that it has some advantages in being able to undertake its deliberations relatively free of such major events.

In this submission we focus on the concept of the integrity agency and on some broad issues relating to the role of these agencies. We leave it to others to deal with particular operational issues such as reporting powers, public hearings and power to arrest.

The Concept of 'Integrity Agency'

In its *Issues Paper* the Committee Secretariat drew heavily on an article in the *Australian Journal of Public Administration* exploring the matter of an appropriate model for a Public Sector Integrity Commission (Faulkner & Prenzler 2010). It also noted the advocacy of an international NGO, Transparency International or TI, which had drawn from the report of Queensland Anti-corruption Commissioner Tony Fitzgerald in developing the concept of a National Integrity System comprising eleven pillars which, in working together in constructive fashion, would go far in establishing a society free of corruptive influences: these pillars include auditor-general, ombudsman and, as one pillar, 'other watchdog agencies' (Pope 2000). The system is well described in the Australian text produced by Brian

Head and his associates (Head *et al* 2008), and is frequently referred to in discussions about integrity agencies.

We follow the work of TI and others in referring to the term 'integrity' as a *system* of specific agencies, policies, practices, codes, laws and regulation that collectively build and maintain integrity, transparency and accountability in the public sector. We identify four types of agency that make their respective contributions to a system of integrity. First, those bodies which check and monitor other public sector bodies, such as auditor-general, ombudsman, privacy commission and human rights commission. These are typically referred to as 'watchdog' bodies because they are often required to check on government operations and therefore need to operate at arm's length from it. Second, are those agencies that *must* be at arm's length from the government to enable them to undertake their regular administrative responsibilities, such as an electoral commission. Third, are the anti-corruption bodies that are established specifically to investigate matters of corruption in the public sector and its stakeholder organisations. Often these bodies have an additional preventive role by providing advice and education in anti-corruption matters. Fourth, in some jurisdictions, a group of integrity agencies might be gathered directly under the auspices of the parliament, as 'officers of parliament' to ensure that they are able to be accountable more directly to the parliament and its committees rather than to a minister or member of the executive branch.

The notion that some integrity bodies are 'watchdogs' and that they need protecting from the executive arm of governments gained clear expression in the early Australian discussions and subsequently in more recent cases that have emerged in both Federal and State jurisdictions (see Evans 1990; Aulich 2012; Aulich & Wettenhall 2017). The independence of all integrity agencies from governments is supremely important: how that independence can be secured is a major issue in modern public administration. This is part of the accountability equation that applies to them. But there is another part: they are themselves part of the public domain, are funded from the public treasury, and have to be accountable themselves. How this equation is to be worked out is another major issue in public administration, and we have to recognise that parliament is the central institution involved.

The ACT Legislative Assembly has a rich history of inquiring into such matters, and several integrity agencies, notably Ombudsman, Auditor-General, Human Rights Commission and Electoral Commission, as well as agents such as the Parliamentary Commissioner for Standards, are well embedded in the ACT system of public administration and generally are well respected instruments of ACT governance. It is therefore surprising to us that the terms of reference for this current inquiry did not make more effort to accommodate them in the field to be explored. The explanation must surely be that the drafters of this set of terms of reference drew a clear distinction between corruption and the forms of maladministration that are the concern of the other integrity agencies, though the use of the word 'integrity' in the title of this committee seems to us to have a scrambling effect. If the Committee is focusing primarily on the establishment of an anti-corruption body, then we suggest that it not be named as an 'Integrity Commission' to ensure that the nomenclature be more consistent with that increasingly being used elsewhere.

It is noteworthy that, in the period 2014-2016, the ACT Legislative Assembly acted to re-constitute the offices of Ombudsman, Auditor-General and Electoral Commission as 'Officers of the Legislative Assembly', consistently with advocacy of Office of Parliament positions that had been strong among parliamentary observers in New Zealand, Britain and Canada, and to some extent Australia, for a decade or more (Dunne 2014; and see Gay & Winetrobe 2003; Beattie 2006; Vic Parliament PAEC 2006; Wettenhall 2011; ACT Legislative Assembly SCAP 2012).

If this notion of 'officers of parliament' is to be progressed in the ACT, the range of such agencies needs to be strictly limited because the cause of good government would be hindered if the special accountability arrangements that need to apply to them were spread widely through the apparatus of public administration. As a former senior Commonwealth public servant has recently argued, coordination may well suffer because Australia has a considerable number of bodies across the several jurisdictions, with the anti-corruption bodies[2] adding to the various audit, ombudsman, human relations and other such bodies involved in integrity protection and promotion, and we might well be better served if we concentrated the anti-maladministration function in a strong single body such as a 'robust' ombudsman (Wilkins 2014). Whether we already have too many such bodies in the ACT is a matter this Committee might consider especially in the light of the size of the jurisdiction and the difficulty it has in securing scale economies.

For MPs: The Two Faces of Responsibility

Most members of parliament, including members of this Legislative Assembly, are members of governing parties or of opposition parties aspiring to be in government, and in much of their parliamentary work they will be led to hold the partisan values of executive government. But they are also part of a larger configuration of members of parliament-at-large, and ideally they will also hold broader and non-partisan values reflecting the totality of the parliamentary institution. Their responsibility is thus double-headed, but the second of these accountability 'faces' often gets minimised or altogether forgotten; then the integrity agencies are unable to perform as they should be performing.

Recent history includes several cases in which Australian integrity bodies have felt the displeasure of the governments whose activities they have been reporting on – in the Commonwealth, the Ombudsman and the Australian Human Rights Commission particularly – leading to cutting of budgets and threats about non-reappointment; and the ACT Auditor-General has suffered similarly (discussed in Aulich 2012). On occasions retiring integrity officers have voiced their own concerns publicly: they have indicated that their ability to perform the tasks parliament has set for them in the legislation establishing their bodies has been compromised by actions by executive government weakening them in various ways (Pearce 1992; Temby 1993).

Considerations for the Committee

Digesting much such discussion in Australia and in international conferences[3], we have constructed a set of propositions about the working environment of these integrity agencies, in the belief that these propositions will be helpful to members of parliament wanting to improve that environment[4]. Some run to questions:

- Most integrity agencies are given statutory authority status because it is recognised that they need a measure of autonomy – but they will need more autonomy than possessed by the general run of statutory authorities.
- They depend on financial and other supports from the executive government, and since they are themselves inspectors, supervisors or regulators of departments and agencies of the same government and so are necessarily sometimes in conflict with it (or parts of it) if they are performing their allocated tasks satisfactorily, not surprisingly the executive government will sometimes seek to curtail their autonomy or otherwise restrict them.
- These restrictions cannot be allowed to interfere in the regular activities for which the agencies are entrusted, such as investigation.
- Restrictions can also include the appointment and removal from office of members of the agencies. Appointments by governments of partisan members of agency boards can only diminish public confidence in the agencies and the esteem and effectiveness in which their reports are received.
- It thus becomes a major issue of governance to ensure that they are not so weak that they cannot perform properly.
- The question arises: what defences do they have, how are they to be protected against actions by the executive government designed to reduce their effectiveness?
- Of course they need to be accountable themselves, so it is important to establish arrangements for checking that they do perform their allocated tasks satisfactorily.
- This draws attention to the parliamentary role, for it is certain that the executive government cannot be trusted always to make these judgments dispassionately.
- Since parliament has usually created and empowered them through its legislation, the easy answer is that parliament should defend them.
- But parliament itself is often weakly placed in its relationships with the executive government.
- So can parliament be strengthened to ensure that it can provide the needed protections?
- Or are other means available to strengthen and improve the work of these agencies?

Virtually without exception, the serious literature on these bodies proposes that there should be supervision by and accountability to a multi-party committee of the parliament capable of making, and therefore expected to make, judgments on a non-partisan basis, independently of particular parties and interests. In some cases the literature has proposed separate such committees for each agency, e.g. with a public accounts committee being deemed appropriate for the auditor-general's office or an elections committee appropriate for the electoral office. But committees of this sort are likely to have a broader range of functions, and be unable to focus only on the integrity issues involved.

So the stronger arrangement comes with proposals for a single 'officers of parliament committee' as in the New Zealand model (Beattie 2006), a committee able without distractions to focus on matters such as working out appropriate budgets for all the agencies, recommending appointments to senior positions within the agency, and receiving and considering regular reports on agency affairs. Where necessary, this responsibility will also include undertaking relationships with the executive government, but it will be understood that the committee speaks for the legislature as a whole and not for a particular

party. By definition it will not include ministers, and particularly it will not be chaired by a minister. The general assumption is that the parliamentary speaker is the appropriate chair, and that, where functions resembling those of ministers in other parts of the administrative system are involved, the speaker-chair will perform them as if a minister.

We observe here that is very difficult in a small legislature to achieve all the separations needed in this model. To help overcome this problem was one of the reasons advanced for the recent expansion in the size of the ACT Legislative Assembly. But, as indicated above, MLAs generally will need to understand that their role extends to being non-partisan parliamentarians as well as partisan members of a particular party or group; only when thy accept that they have this dual role will the system of integrity agencies work.

We observe also – also reinforcing a point made earlier in this submission – that this is a very special model of autonomy/accountability that could not be applied widely through the administrative service. This is why all discussants of officer-of-parliament-type arrangements insist that the number of such arrangements must be kept very small, not to include bodies performing executive-managerial functions that could otherwise be performed by government itself or its regular statutory bodies, and limited to agencies such as those regulating the composition of the legislature (electoral commissions) or the ethical behavior of the general administration (audit, ombudsman).

Notes

1. For particularly relevant committee reports, see Standing Committee on Justice and Community Safety, *The Commission for Integrity in Government Bill 1999,* 2001, and *Inquiry into Electoral Issues in the ACT,* 2011; Standing Committee on Administration and Procedure, *Latimer House Principles,* 2009, and *Inquiry into the Feasibility of Establishing the Position of Officer of Parliament, 2012;* Standing Committee on Public Accounts, *Inquiry Into the Auditor-General Act 1996,* 2010.
2. There is a small but significant literature on the specialised anti-corruption bodies: see, for example, Heilbrunn 2006; Léautier 2006; Quah 2009. Listing the agencies in this way also brings to mind the quite frequent preference governments and parliaments have for royal commissions and similar ad hoc inquiry bodies, on which see Prasser & Tracey 2014.
3. Notable for us were an International Conference on Transparency for Better Governance held in Monterrey, Mexico, in July 2006 (see Wettenhall 2006, 2007), and an Integrity Agencies Workshop held at the University of Canberra in July 2009.
4. Adapted from list of propositions originally presented to the University of Canberra Integrity Agencies Workshop in July 2009 (Wettenhall 2009).

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