LE GISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON AN INDEPDENDENT INTEGRITY COMMISSION 2018

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Submission Cover Sheet

Inquiry into an Independent Integrity Commission 2018

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ACT BAR ASSOCIATION

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Select Committee
Integrity Commission 2018
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Dear Chair,

Independent Integrity Commission

The ACT Bar Association ("the Bar") welcomes the opportunity to make a submission to the Select Committee ("the Select Committee") on an ACT Integrity Commission ("ACTIC") which is considering the *Anti-Corruption Integrity Commission Bill 2018* ("the Bill") presented by the leader of the Opposition Mr Coe and the *Exposure Draft of the Integrity Commission Bill 2018* presented by the Chief Minister ("the Exposure Draft").

The Select Committee's report was released on 31 October 2017. The report recommended the establishment of an Anti-Corruption and Integrity Commission and included in the report some 79 recommendations covering a range of matters concerning the structure, powers and accountability of such a body.

The Government Response to that report tabled on 26 February 2018 committed the Government to establishing an Integrity Commission and agreed or agreed in part to 25 recommendations, agreed in principle to 11 recommendations, and noted 43 recommendations. The Explanatory Statement to the Bill indicates that the philosophy underpinning the drafting of the Bill was to give effect to as many of the recommendations of the Select Committee's report as possible:

> The *Anti-Corruption and Integrity Commission Bill 2018* (the Bill) has been drafted to give effect to 76 recommendations made by the Committee. The three remaining recommendations cannot be met through legislation; one will be fulfilled through a motion to refer the Bill to a Committee (Recommendation 3); another requires the ACT Government to seek advice on potential amendments to the *Criminal Code 2002* (Recommendation 20); and the final recommendation is in regard to resources for the ACT Office of the Director of Public Prosecutions, which is a budget consideration (Recommendation 46).

The Explanatory Memorandum contains a comparative table analysing each recommendation made by the Select Committee against the Exposure Draft. It suggests that the Exposure Draft purports to give effect to a large proportion of the Select Committee's recommendations.

Therefore, at least in terms of numbers, both models are largely faithful to the recommendations of the Select Committee.

Both the Bill and the Exposure Draft are substantial pieces of legislation. The ACT Bar does not intend to make comprehensive submissions in respect of the entirety of the two models that have been advanced. The Bar will make further submissions once a Bill has been developed in light of the Select Committee process.

However, there are a number of observations that are made.

The Definition of Corrupt Conduct

The Bar's submission to the Select Committee emphasised the importance of ensuring that definition "corrupt conduct" placed a focus on conduct that impairs or could impair public confidence in public administration. The models that have been advanced address differ in drafting approaches but both substantially address this concern. See for example the Exposure Draft at section 9(4) and the definition of serious corrupt conduct at section 17. The Bill adopts a general definition of "corrupt conduct" and also identifies specific offences that may attract the operation of the broader definition. See Part 2, sections 7 and 8. The drafting in the Bill at this point follows the approach adopted in the Independent Commission Against Corruption Act 1988 (NSW). Both approaches adopt, in the submission of the Bar, appropriately wide definitions of corrupt conduct.

The Bar was also concerned to ensure that the test that had to be satisfied before the proposed integrity commission could launch an investigation of corrupt conduct was not formulated in such a way as to prevent investigations beginning. The Bar recommended the body created should have the power to investigate corrupt conduct and to bring the state of mind required to justify an investigation in line with formulations adopted elsewhere in the criminal law for the exercising of coercive powers; that is, an investigation can commence when there is a "reasonable suspicion" of corrupt conduct. Part 3.4, section 97 of the Exposure Draft provides that the Commission may investigate a corruption report if the commission "suspects on reasonable grounds that the conduct in the corruption report may constitute corrupt conduct".

A similar approach is adopted in the Bill: see section 29.

Retrospective Operation

The Exposure Draft contains provision for the retrospective operation of the proposed Act. Significantly, (section 8(3)) the Exposure draft seeks to impose a limitation on that retrospectivity in respect of "conduct", inter alia, that has already been investigated by an investigatory body. The provision in full provides:

> (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.

(4) In this section:

investigatory body means—

(a) an integrity body; or

(b) another entity (whether or not still in existence) with power to require the production of documents or the answering of questions.

The Bill contains no such provision. Public discussion about the Exposure Draft has suggested that this provision may have the effect of preventing the Commission from investigation certain issues that have in the past been the subject of investigation by the Auditor-General. If that is the intent of the provision it is unlikely in practice to impose such a constraint given the question of what is the precise "conduct" that has been investigated would be impossible to determine in any given case. Given the public interest test at section 3(a) of the Exposure Draft it might be a preferable approach to simply identify past investigation of conduct by an investigatory body as a matter going to the identification of where the public interest lies rather than being a limiting issue in and of itself.

Power of the Commission to Investigate Judicial Officers and the AFP

Both Exposure Draft and the Bill apply their schemes to the AFP when performing ACT policing roles. The Bar welcomes this approach noting that the application of the integrity scheme to police officers carrying out ACT policing functions will have to be done with the agreement of the AFP.

The Exposure Draft exempts judicial officers any ACAT members, registrars and staff exercising judicial or quasi-judicial powers from the application of its integrity scheme. Given there is already oversight mechanisms – including the Judicial Council and the Judicial Commission – this limitation will ensure that the separation of powers is respected.

Adequate Statutory and Financial Basis

In its original submission the Bar emphasized the importance of the integrity body being given a proper statutory basis and be given a funding arrangement that gives that body the capacity to discharge its functions as an independent body without having to go cap in hand to the government for each investigation that it undertakes. Resources must be sufficient to give the body the critical mass to provide reports on systemic issues rather than simply being a passive complaint processing body. Whilst the Bill and the Exposure Draft provide a statutory basis for the proposed body they are silent as to the funding arrangements that will apply to the newly created body.

The Structure of the Commission and Inspectorate

The Exposure Draft and the Bill propose broadly similar models – a commission headed by a commissioner and an inspector to provide oversight of the Commission. Each scheme proposes

restrictions on who may be appointed to each role (including in the case of the Exposure Draft who is eligible to be appointed as a CEO). The Bill (at section 98) allows the speaker to appoint a person as commissioner who has been a judge (of named courts) or a lawyer for at least 10 years subject to the further conditions at section 98(2). The Exposure Draft permits the speaker to appoint a person who has been a judge of named courts subject to the further conditions set out at section 26(2). Whilst there are virtues in both models the requirement that the person has been a judge of the courts named will in practice mean the field of eligible will be very small, older and generally male. In that respect, the Exposure Draft may be too restrictive as to eligibility criteria. The Bar would suggest that an approach similar to that adopted in NSW; that is, that the potential appointee be eligible to be appointed as a judge.

It is noted that in both models, the criteria that applies to acting commissioners are more permissive. In respect of the Exposure Draft there do not seem to be any criteria that apply. The time frame for having an acting commissioner are not set out in either the Exposure Draft or the Bill. In the view of the Bar this is a serious omission.

The Exposure Draft and the Bill with some modifications apply to the position of inspector the eligibility criteria that is applied under each scheme to the position of the commissioner. As noted above, so far as the Exposure Draft is concerned, this criteria might be too restrictive.

It is also noted that the criteria do not apply to an acting inspector. The Exposure Draft does seem to allow for the inspector to be re-appointed after the expiration of his/her (seven) 7 year term. This is inconsistent with the approach taken to the commissioner.

Conduct of an Investigation and Examination

The Bill mandates that the commission in conducting an investigation must comply with the rules of natural justice (section 45(1)(a)). It is assumed that this is an error and the intended reference is to an examination. The Exposure Draft (section 137(a)) mandates that the commission "must comply with the rules of natural justice and procedural fairness". It is not clear what is intended by these provisions. Given that "natural justice" and "procedural fairness" have established meanings the importation of these concepts as mandatory requirements at an examination might place undue restrictions on how examinations are conducted. The requirement is also inconsistent with other specific provisions in the Exposure Draft. See for example section 152 (2) of the Exposure Draft. These provisions require further consideration. Comparable statutory schemes have not followed this approach.

Derivative Use Immunity

The Exposure Draft and the Bill propose different versions of derivative use immunity. See respectively sections 175 and 46(3). The Bill proposes a form of absolute derivative use immunity. The Exposure Draft proposes what is described as a "partial derivative use immunity".

The Explanatory Statement to the Exposure Draft suggests no other integrity commission model in Australia has adopted a derivative use protection. As the Explanatory Statement goes on to say:

> In addition to use immunity, the Bill also implements derivative use immunity which protects evidence obtained *as a result of* evidence a person gives when being forced to incriminate themselves. No other State/Territory Integrity Commission has legislated to protect derivative use immunity. The problem with derivative use immunity is that it can greatly restrict the amount of evidence that can be used in a prosecution following a finding of corrupt conduct.

Concerns have been raised that derivative use immunity generates little admissible evidence and makes persons under investigation by Integrity Commissions 'conviction-proof' in any subsequent criminal trial.

On the other hand, it may be unfair to not provide derivative use immunity to persons investigated by the Commission. No difference can be meaningfully drawn between the harm that may flow from evidence directly obtained under compulsion, and incriminating evidence that was indirectly derived from this information. Derivatively obtained information can be as damaging as the original self-incriminating information. The person has still been forced to assist the Crown to discharge the burden of proof in both cases.

Permitting derivative use immunity is therefore inappropriate in the ACT as a human rights jurisdiction[1]. The Bill's approach implements partial derivative use immunity, in that indirectly obtained evidence is inadmissible in Court where the evidence could not have been obtained, or the significance for which could not have been appreciated, but for the compulsorily obtained evidence. Should prosecution later occur based on an investigation and brief of evidence referred by the Commission, the prosecution will have to prove that any derivatively evidence could have been obtained, or its significance could have been appreciated, without the compulsorily obtained evidence. This implements the measured approach to derivative use immunity recommended by Warren CJ in *Major Crime (Investigative Powers) Act 2004* [2008][2] VSC 381. This approach respects human rights whilst also permitting enough derivatively obtained evidence to effectively prosecute criminal charges laid following an investigation by a body with compulsory information gathering powers. As per her Honour's judgement, it is the least restrictive means available.

Clearly the protection against self-incrimination is an important common law protection. Derivative use immunity is an important protection when the right not to incriminate oneself is over-ridden by legislation. See generally section 128 of the *Evidence Act 2011 (ACT)*.

Guidance as to how this immunity would operate in practice was given by Chief Justice Warren:

> 157 Returning to the hypothetical examples I set out earlier, I note the problem highlighted in each instance falls squarely into the first category of derivative evidence established in S(RJ). My approach will continue to allow investigations to take place under the Act, and will not exclude the Crown from utilising any of the following:
>
> > (2) evidence that was discovered as a result of the testimony, but that could have been discovered without such testimony; (3) evidence that would, or would probably, have been discovered even without the testimony; and (4) evidence that was discovered after the testimony was given, but independently of the testimony.
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> 158 It will, however, prevent a person being compelled to incriminate themselves from their own testimony in circumstances where the evidence could only have been discovered as a result of that testimony.

[1] This might be a typographical error.

[2] The reference is wrong. It should read [2009] VSC 381.

159 The Crown will bear the onus of establishing which evidence is derivative in this regard. This burden will be no more onerous and no different to the usual burden of demonstrating that evidence is admissible against an accused. To this effect, Cory J in Phillips offered a degree of guidance to trial judges and the prosecution in relation to the evidentiary burden relating to derivative use immunity. I adopt the following statement:

> In *S. (R.J.)*, Iacobucci J. noted the semantic difficulties involved in any attempt to define 'derivative evidence'. He therefore proposed instead not a definition of the term, but rather a test to identify the types of derivative evidence which should be excluded at a later criminal trial. This approach (at p. 561) excludes 'evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness'. This 'but for' test is to be applied in a flexible and practical manner at the discretion of the trial judge. The burden of proving that the admission of this evidence would violate the residual protection against self-incrimination found in s. 7 rests with the accused person claiming the violation. However, *as a practical matter, much of the evidentiary burden will be borne by the Crown. This must follow since once the accused can point to a 'plausible connection' between the compelled testimony and the evidence, then realistically only the Crown will have access to information as to how the evidence was obtained* (emphasis added).

The limitation of the derivative use immunity as proposed may effects on the ability of the ACT DPP to prosecute matters referred to it by the Commission.

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.

Public Hearings

In its original submission, the Bar put this view in respect of public hearings:

> Some jurisdictions have no public hearings. Others do. It is recognized that the holding of public hearings can "trash" reputations easily. The holding of public inquiries has in some instances proved controversial and have in some instances become somewhat theatrical in nature. The Bar favours an approach that assumes that the hearing will take in private but allows public hearings to be conducted based on a public interest – private right discretion to allow public hearings to be conducted when ultimately in the public interest to do so. For example, where systemic issues arise the balance may weigh in favour of public hearings. The content of what the "public interest" is must in our view be given specific content while in the end leaving the resolution of the matter in the hands of the Commissioner. Generally this is the approach in most jurisdictions. For example in smaller jurisdictions see section 139 of the *Corruption, Crime and Misconduct Act* 2013 (WA) (assumes that hearing will not be in public unless the benefits of public exposure and awareness outweigh the potential for prejudice or privacy infringements). Similar provision is made in Queensland : section 177 of the *Crime and Corruption Act 2011*.

Both the Bill and the Exposure Draft adopt different approaches to this issue. The Bill creates a presumption that the examination will be in the public domain unless it is in the public interest that the examination is conducted in private. A list of matter is set out which identifies the matters that may be taken into account in deciding this issue: section 32 of the Bill. The Exposure Draft adopts a

neutral position providing that examinations may be held in public or private. A list of mandatory and discretionary matters is identified as being relevant to the determination of this issue: section 138 of the Exposure Draft.

The Bar notes the arguments that have been advanced in favour of the position advanced in both cases. However, the Bar for the reasons given previously, adheres to the view that it should be assumed that hearings are in private unless the public interest suggests they should be held in public. This approach strikes a better balance between transparency of process and the right to a fair trial.

Gathering Evidence and Prosecutions

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

The Bar is not convinced that either the Exposure Draft or the Bill reflect these concerns.

The Bar is happy to participate in any further consultative processes and is willing to appear before the Select Committee if required.

Yours faithfully

[redacted]

Ken Archer
President