




Guy Boland

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By email

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

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Dear Dr Cullen

Select Committee on an Independent Integrity Commission - Submission

I thank the Committee for an opportunity to make a submission.

Governance and funding that delivers independence

The independence of the commission will depend on a range of factors, not just governance and funding. The Committee should consider whether part-time commissioners may undermine the independence of the commission where those part-time commissioners are also engaged in other professional fields or tempted to 'tailor' their work to secure permanent appointments.

Actual as well as perceived independence is important.

Powers available to the commission

The Issues Paper refers to a variety of features of a 'Model Commission'. The Issues Paper, in particular, refers to a commission which has the capacity to apply for warrants to search properties and seize evidence, and the capacity to engage in covert tactics – including 'listening devices, optical surveillance, undercover agents and targeted integrity tests'.

These are significant powers, and safeguards should protect against their misuse or abuse. The necessity and appropriateness of these particular powers should not be assumed, and the extent of any restrictions or impositions on personal and property rights through their exercise should be reasonable, justified and proportionate. To prevent these powers being misused and from an accountability perspective, express criteria should be set out in any legislation enacted. For example, in deciding whether to grant a warrant, regard should be had to:

- whether issuing the warrant is necessary having regard to alternative means of obtaining the evidence;
- the extent to which there has been attempts to obtain the evidence by other means;
- the seriousness and subject matter of the evidence in relation to which the warrant is sought;
- the likelihood if the warrant is not granted, the evidence will be destroyed, concealed or removed;
- the potential or actual loss or damage to the community if the warrant is not granted;

- the extent of the evidence already available in respect of the subject matter;
- the public interest; and
- any other relevant matter.

In issuing a warrant, conditions should also be imposed on the authority conferred, including:

- who is authorised under the warrant;
- the duration of the warrant;
- the extent of the search authorised under the warrant; and
- any other relevant matter.

A warrant should only be issued to a member of the commission by a Supreme Court judge. This is consistent with practice in other jurisdictions, and will enhance public confidence.

In addition, detailed and prescriptive criteria should be included in any legislation which permits the commission to engage in a controlled operation. One safeguard would be to require the officer of the commission who it is proposed should engage in the controlled operation to apply under the *Crimes (Controlled Operations) Act 2008 (ACT)* and for that officer to be treated as a law enforcement officer under that Act. Punitive measures should also be in place to protect against unauthorised controlled operations in connection with the commission's work. Evidence gathered about unrelated third parties should form no part of the commission's investigation.

I also have reservations about the commission being in a position where its officers may engage in entrapment (see by J D Heydon, 'The Problems of Entrapment' (1973) 32 *Cambridge Law Journal* 268, 270-272).

It is foreseeable that many applications for warrants and requests for controlled operations will be urgent in nature. Many might think that it will not necessarily be practicable for detailed applications to be presented. From the Committee's perspective, this may be relevant to 'efficiency'. However, the Committee should carefully consider safeguards to otherwise very extensive powers, and should rely on empirical evidence, where available, to establish the 'effectiveness' of any of the powers sought. Many of these powers are already covered in other pieces of legislation and granted to the police. Why the commission should separately receive them is not obvious.

Issues regarding retrospectivity, including human rights, and the timeframes around which former actions can be assessed

The commission should not undertake investigations into historical matters where it is unlikely that any probative evidence will be available to reasonably support the commission's findings or deter future wrong doing.

Please contact me should you have any queries in relation to the above.

Yours sincerely

Boland