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FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON AN INDEPENDENT
INTEGRITY COMMISSION 2018

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Submission Cover Sheet

Inquiry into an Independent Integrity Commission 2018

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Mr Hamish Finlay
Committee Secretary
Select Committee on an Independent Integrity Commission 2018
ACT Legislative Assembly

[By email: committees@parliament.act.gov.au]

Dear Mr Finlay

Further inquiry into the establishment of an integrity commission for the ACT

The ACT Human Rights Commission welcomes the opportunity to provide this submission to the Select Committee's examination of the Anti-corruption and Integrity Commission Bill 2018 (PMB) and the Government's draft Integrity Commission Bill 2018 for the establishment of an integrity commission for the ACT.

The Commission supports the establishment of an independent integrity body to investigate, detect and prevent corruption in the public sector. We consider that these are important reforms, which will assist to strengthen the rule of law and enhance public confidence in the ACT's institutions. Accountable and effective public administration is integral to good governance and social cohesion.

We note that the development of both bills has been guided by the recommendations made in the report by the Select Committee on an Independent Integrity Commission, which was released in October 2017. It is clear that the overall structure and content of the bills have benefited from the careful work undertaken by the previous Committee in articulating an appropriate integrity model for the ACT.

Human rights implications

A legislative scheme that creates wide-ranging coercive powers to investigate and report on matters relating to alleged or suspected corruption will inevitably limit various rights contained in the *Human Rights Act 2004* (HR Act), including the right to privacy and reputation (s 12), and the right to a fair trial and related criminal proceeding rights (s 21 and s 22).

Limitations on rights guaranteed in the HR Act must conform to the requirements of s 28 of the HR Act, which requires limits to be reasonable and demonstrably justified in a free and democratic society. A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. This involves tailoring the rights-restricting measure to do no more than is necessary to achieve a legitimate aim, and ensuring that there are adequate safeguards against abuse.

The previous Select Committee was cognisant of the importance of including appropriate safeguards in the enabling legislation for the integrity commission to ensure procedural fairness and to guard against its investigative and coercive powers being abused.¹ The Committee sought to emphasise those considerations throughout its report.

Many of these issues, however, are contingent on the way that the provisions are drafted. The Commission therefore welcomes that the terms of reference for the current inquiry expressly includes consideration of human rights requirements under the HR Act. Our submission is directed at the human rights aspects of the bills as drafted. Our analysis is grounded in the minimum standards contained in the HR Act, with which all legislative proposals must comply to be compatible with human rights.

Exposure Draft of the Integrity Commission Bill 2018

As noted in the Chief Minister's tabling speech,² the Commission was consulted in the development of the exposure draft bill. We consider that the bill broadly strikes the right balance between human rights protections and improving transparency and confidence in public administration. We commend the detailed human rights assessment contained in the explanatory statement, which aided our scrutiny of the bill. In our view, subject to the issues identified below being addressed, the bill as a whole is reasonably circumscribed and contains appropriate safeguards to meet its objectives in a rational and proportionate way.

Witness arrest warrants: The bill provides the commission with a power to apply to a magistrate for a warrant to arrest a witness who fails to attend in accordance with the summons (s 156). A magistrate may only grant such a warrant if certain criteria are met, including if the commission has taken reasonably practicable steps to contact the person. The magistrate must also consider a range of factors when deciding whether it is in the interests of justice to issue the warrant, including the importance of the evidence that the person is expected to give and whether the evidence could be obtained by other means.

The bill 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.

We welcome that, 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

¹ Final Report of the Select Committee on an Independent Integrity Commission, October 2017, p 271.

² Parliamentary Debates, ACT Legislative Assembly, 31 July 2018, p 2366. (Mr Barr, Chief Minister).

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.

To ensure the reasonable exercise of the arrest powers, the procedures for executing a warrant in s 157 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. Comparable restrictions are made on the execution of arrest warrants issued under the *Magistrates Court Act 1930* (s 66(3)).

Treatment of privileges: The bill confers broad powers for the commission to compel a person to provide information, documents and things. However, we consider that any limitation of the right against self-incrimination in s 22(2)(i) of the HR Act in these circumstances is likely to be reasonable as the bill extends use and derivative use immunity to any evidence that is obtained compulsorily.

The explanatory statement states that any other claim of privilege, including legal professional privilege and journalist privilege, ‘will be determined by the Supreme Court which will undertake a balancing exercise to determine whether the privilege should be waived or not’.³ This approach was taken to ensure that the bill is human rights compliant,⁴ and departs from the position articulated in the Select Committee’s 2017 report, which recommended waiving legal professional privilege in circumstances where the commission uses its power to compel the production or giving of evidence (Recommendation 34).⁵

The Commission considers that a blanket waiver of legal professional privilege and journalist privilege may constitute a disproportionate limitation on the right to privacy (s 12), freedom of expression (s 16) and the right to a fair trial (s 21) in the HR Act. In our view, a less rights-restrictive alternative would be to grant a qualified privilege, whereby an application could be made to the court to determine the public interest in having the privilege waived against the public interest in the preservation of the privilege. The approach adopted in the bill, as described in the explanatory statement, is therefore welcome.

However, we are concerned that the provisions as drafted in the bill may not reflect this approach with sufficient clarity. The relevant provisions in the bill are silent about the court having to undertake any weighing exercise or the possibility of waiving privilege in the public interest. Instead the bill simply specifies that the Supreme Court must determine whether the information, document, or thing in question is the subject of privilege.⁶ If the Court decides it is subject to privilege, the person will not be required to provide it to the commission. If the Court decides it is not subject to privilege, the person will be required to provide it to the Commission. On one reading, the Supreme Court is simply being asked to

³ Explanatory Statement, p 134. See also pp 19-20.

⁴ Ibid.

⁵ Final Report of the Select Committee on an Independent Integrity Commission, October 2017, p 223.

⁶ See, for example, ss 124 and 161.

determine whether privilege applies or not. It does not address the question of whether privilege, where it is found to apply, should be waived in the appropriate circumstances. We consider that these provisions would benefit from clarification, as if they are inadvertently cast too broadly, they could risk undermining the commission's ability to undertake full and proper investigations.

Anti-corruption and Integrity Commission Bill 2018 (PMB)

While the bill is closely modelled on the Select Committee's recommendations and contains a number of important safeguards, there are several aspects that we consider could give rise to issues of incompatibility with the HR Act. Without modification, these aspects of the bill could, in our view, result in disproportionate and/or unjustified interferences with human rights.

Witness arrest warrants: Section 36 of the bill provides that an authorised officer of the commission may apply to a magistrate for a warrant to arrest a person who has been given notice to appear before the commission as witness but fails to appear. A person may be held in custody until the person is released by order of the commission (s 36(3)).

It is welcome that the bill requires arrest warrants to be issued by courts rather than the commission itself. However, we are concerned by the absence of any corresponding provisions in the bill to ensure that the criteria and procedures for issuing and executing a warrant are compliant with the HR Act. For example, there is no requirement for the magistrate to consider the impact of using an arrest warrant on the witness, no time limit to a detention, and no provision as to the manner of detention. In our view, absent appropriate safeguards, the exercise of these powers is likely to be characterised as an arbitrary deprivation of the right to liberty, contrary to s 18 of the HR Act. As noted above, we consider that the equivalent provisions in the Government's exposure draft bill, subject to the amendments that we have recommended, are to be preferred in this regard.

Treatment of privileges: Consistent with Recommendation 34 in the Select Committee's 2017 report, the bill provides that a person cannot rely on the privilege against self-incrimination or legal professional privilege to refuse to provide information or documents to the commission (s 46). However, any self-incriminating material obtained directly or indirectly as a result of a person being compelled to provide information cannot be used as evidence against that person in any criminal or civil proceeding (s 46(3)). We consider that the conferral of use and derivative use immunity in s 46(3) is an important safeguard that goes towards ensuring that any limitation of the right against self-incrimination in s 22(2)(i) of the HR Act remains justifiable in accordance with the reasonable limits test in s 28 of the HR Act.

However, we are concerned that the bill offers no corresponding safeguards to ensure that the abrogation of legal professional privilege is also reasonable and proportionate. The confidentiality of lawyer-client communications is protected under the right to privacy (s 12) and is relevant to the right to a fair trial (s 21) in the HR Act. It is also a fundamental common law right. As noted above, we consider that it would be less rights-restrictive to grant a qualified privilege, whereby an application could be made to the court to determine

the public interest in having the privilege waived against the public interest in the preservation of the confidentiality.

Eligibility requirements for commission staff: The bill provides that a person cannot be engaged or employed as a staff member of the commission if the person is or has been a member of a registered party; a political party registered under a law of the Commonwealth, a State or another Territory; or a political party (s 112). This provision seeks to give effect to Recommendation 74(b) in the Select Committee's 2017 report, which recommended that commission staff should not have any current or prior political affiliations.

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.

Exemption from Privacy Act: The bill will exempt the commission from the operation of the *Information Privacy Act 2014*. As a result, the commission will not be required to observe the Act's rules about storage, collection, use and access to information gathered by the commission under any capacity. Under s 149 of the bill, the commission must develop and publish information handling guidelines in consultation with the Information Privacy Commissioner.

Properly tailored exemption provisions will be compatible with the HR Act if the purpose of the exemption is to balance the right to privacy with other legitimate interests, and provided that there are other information-handling standards that apply to the exempted entity. Such standards should reflect the requirements of the Privacy Act as far as possible. The requirement in s 149 to develop guidelines in consultation with the Information Privacy Commissioner is therefore a welcome safeguard.

However, it is not clear why the commission should be granted full exemption from the operation of the Privacy Act. In our view, the commission's acts and practices in respect of administrative matters, such as the handling of the employment records of commission staff, should not be exempt from the Privacy Act without sound reason. The explanatory statement to the bill does not explain why a complete, rather than partial exemption would be necessary. We understand that other Officers of the Legislative Assembly such as the ACT Auditor-General are not exempted from complying with the requirements of the Privacy Act when exercising functions of an administrative nature. We consider that the equivalent provisions in the Government's exposure draft bill, which provide for a partial exemption, are to be preferred.

Public examinations: The bill provides that an examination must be conducted in public unless the commission decides it is in the public interest to hold the examination in private (s 33). The commission is required to consider a range of matters when deciding whether it is in the public interest to conduct an examination in private, including any representations from the person subject of the allegation of corrupt conduct.

While these are important safeguards, we are concerned that a presumption in favour of public examinations could set an unfairly high bar and risks disproportionately interfering with a person's right to privacy and reputation. We are not aware of other jurisdictions applying a similar threshold. On the other hand, we recognise that a presumption that favours private examinations may equally give rise to concerns, as it could undermine public confidence in the commission's work. In our view, a neutral presumption as adopted in the Government's exposure draft bill, is more likely to ensure that the right balance is struck between the competing interests, and should be preferred.

If you have any questions or would like more detailed information on any of the issues raised in this submission, please do not hesitate to contact us on (02) 6205 2222.

Yours sincerely,



Dr Helen Watchirs OAM
President and Human Rights Commissioner
31 August 2018