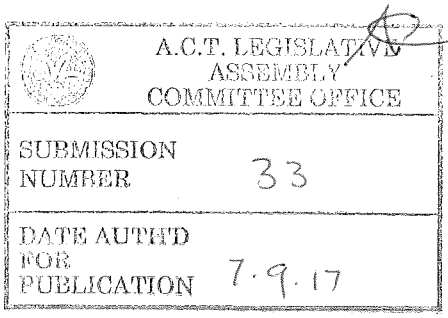
Select Committee on an Independent Integrity Commission



Submission by the ACT Commissioner for Standards, ACT Legislative Assembly

20 August 2017

Introduction

1. I regret being unable to appear before the Committee in person due to my absence in France and am grateful for the opportunity to make a belated written submission.

2. Having regard to the detailed submissions already made by the Clerk of ACT Legislative Assembly ACT, the Public Sector Standards Commissioner, the ACT Auditor General and the ACT Ombudsman, I do not intend to canvass the existing mechanisms for reducing the risk of corrupt and inappropriate official conduct and will concentrate on what I perceive to be the fundamental issues arising from the proposed establishment of an Independent Integrity Commission ('the Commission').

3. As others have suggested, there is no apparent evidence of widespread corruption within the Australian Capital Territory. However, numerous instances of corruption have been revealed within NSW and other states and it would be naive to imagine that the ACT is an island of financial probity, untainted by any such misconduct. As the ART Anti-Corruption Working Group mentioned in their submission, "corruption is usually hidden, secret, insidious and difficult to discover, identify and eradicate." The litany of well-publicised findings by the NSW Independent Commission Against Corruption ('ICAC') and similar bodies in other Australian jurisdictions demonstrates that corrupt conduct may flourish despite apparently strict security protocols and that it may elude detection by the conventional approaches of law enforcement and regulatory bodies. In my view, there is ample justification for the proposed Commission.

4. Whilst there may be scope for debate about certain aspects of the Commission's role and powers, I suggest that the general principles are clear. Such a Commission should:

   - be genuinely independent;
   - be authorised to investigate public corruption in any form;
   - be given broad legislative powers;
   - have a recognised educative function;
   - be adequately resourced, but affordable; and
   - be duly accountable.

The model

5. I agree with the Ethics and Integrity Adviser that the Commission should:

   - *be established by an Act of the Assembly;*

- *be headed by a Commissioner appointed by and accountable to the Assembly (through a standing committee established under the Commission Act), rather than to the Executive;*

- *be led by a Commissioner of sufficient stature to warrant the respect and cooperation of all levels of the ACT administration;*

- *have jurisdiction in respect of all "public office holders":*

  whether in the Assembly, the judiciary or the public service broadly defined;

  whether full- or part-time;

  whether appointed under statute, employed or engaged under contract;

  whether remunerated or honorary; or

  to the extent that they may exercise powers conferred under a statutory licence,

6. However, in my view, some care will need to be taken in the drafting of the relevant legislation to ensure that its application to members of the Assembly and the judiciary is limited to investigating acts of criminal dishonesty and that it is not permitted, let alone required, to intrude into areas that, as a matter of public policy should properly be the province of the Assembly or of the judicial Council or Judicial Commission (see paragraphs 18 - 26).

7. On the other hand, I would also suggest that the legislation should ensure that the Commission is free to investigate the conduct of people who are not themselves public office holders, but whose conduct is intended or likely to lead to the corruption of public office holders. Even people who might baulk at accepting an overt bribe may be seduced from the path of duty by the more subtle influences of free travel and other benefits that may be provided without any accompanying request for favours but nonetheless affect the impartiality of subsequent decisions. Section 8 of the *Independent Commission Against Corruption Act, 1988* (NSW) ('the ICAC Act') provides, inter alia, that the term, "corrupt conduct" includes:

   any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority ...

8. A similar definition would also permit the Commission to investigate conduct that either has or could have the effect of seducing public office holders from their duty, even if there is no evidence that any have already succumbed to temptation. I agree that the

Commission should not otherwise have jurisdiction in respect of actions taken in the private sector.

9. The Commission's investigative role should be confined to allegations of serious or potentially serious misconduct, but the legislation should make it clear that this includes conduct that may have serious long term implications, even though particular instances, considered in isolation, might not fall within this description.

10. I do not believe that it is either necessary or desirable for the Commission to investigate allegations of professional misconduct or other breaches of ethics not involving criminal conduct or threatening the honest or impartial exercise of official functions by public officials. In my view such matters are usually best resolved by senior officers such as the Public Sector Standards Commissioner or by the relevant professional bodies.

The Commissioner

11. In my view, the Commissioner should be a former Supreme Court judge or some other eminent lawyer with appropriate experience.

12. The Commissioner should be engaged on a full-time basis for a fixed term and lead a small organisation that maintains a constant program of investigation, research and education.

13. Suggestions of a Commission that would remain dormant until activated by departmental or Ministerial response to a particular complaint should, in my view, be rejected. No other Australian jurisdiction has embraced such a proposal and it could offer nothing more than a succession of ad hoc hearings presided over by a Commissioner, or perhaps a series of Commissioners engaged on a short term basis, with no long term or systemic responsibilities. Reliance upon short term secondment of staff from other government agencies would also mean that the Commission, even when activated, would have limited independence, would find it difficult to evoke the trust of potential whistle-blowers, would lack the capacity to develop knowledge and expertise, and would have little, if any educative role in fostering public integrity and preventing corruption..

14. The Chief Commissioner of the Tasmanian Integrity Commission has been appointed on a part-time basis, but he is the Chairman of a board with five other members that bears corporate responsibility for ensuring that the Commission's functions and powers are properly exercised and the Chief Executive Officer was until June this year the Queensland Integrity Commissioner. I also note that the Northern Territory Government intends to establish an independent anti-corruption body and that Brian Martin AO QC has recommended that the NT government appoint the Hon. Bruce Lander QC for an initial period of two years on a part-time basis. Mr Lander is currently the South Australian Independent Commissioner Against Corruption and Mr Martin envisages that he would retain that role, with the two governments presumably entering into a time

sharing arrangement of some kind. It is thought that this would save some expense.[1] In making that recommendation, Mr Martin, who is a former Chief Justice of the Northern Territory Supreme Court, may have drawn upon local expectations as to the level of corruption that the foreshadowed body is likely to reveal, but I would not recommend that the ACT appoint a part-time Commissioner, whether in conjunction with another jurisdiction or otherwise.

15. The number of complaints received by the newly formed Commission could taper off after an initial surge during the first two years, as Mr Martin expects will occur in the Northern Territory, but that might not occur. Investigations into some complaints might reveal related or similar acts of corruption unknown to the initial complainants. The fact that complaints have obviously been taken seriously and duly investigated, might encourage other potential whistleblowers to raise other issues. The experience gained in investigating particular complaints might move the Commission to conduct investigations on its own initiative if, as I suggest, it is given the power to do so. Technological advances and the growth in 'cybercrime' may also provide challenges, the nature of and extent of which are difficult to predict.

16. The Commission will require strong, creative and decisive leadership by someone who can devote his or her energies to the task on a full-time basis. I also think it would be easier for a full-time Commissioner to forge productive professional relationships with the Australian Federal Police ('AFP') and other agencies engaged in the prevention or detection of corrupt conduct within the ACT.

17. The Commission's focus on the maintenance of public integrity should extend beyond the investigation of apparent instances of corruption. It should have an ongoing role in identifying areas of vulnerability to fraud and other forms of corruption and in providing advice and education. In my opinion, these objectives are again more likely to be achieved by a small organisation in which the Commissioner has the time to consider and address such systemic issues as well as the more immediate demands of pending investigations. That is unlikely to occur unless he or she is at the helm on a full-time basis.

18. I would also fear that the appointment of a part-time Commissioner, however eminent and competent, would not be seem as posing a serious threat to those tempted to corruption, but as a political gesture, enabling the ACT to fall into line with other jurisdictions. This would diminish the standing of the Commission and limit its effectiveness.

19. There are likely to be more effective means of saving money, such as reliance on cooperative arrangements with established agencies and avoidance of duplication, but the quest for financially efficient means of accomplishing the Commission's goals without compromising its effectiveness will also require time for reflection, consultation

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[1] Brian Martin AO QC, *Anti-Corruption, Integrity and Misconduct Inquiry- Final Report* (2016) at paragraphs 287 et seq.

and planning. This may be difficult for a part-time Commissioner whose cameo appearances might have to be devoted to the resolution of particular complaints and other more immediate demands, rather than to the overall direction of the organisation he or she would notionally lead.

Roles and functions

20. I agree with the view of the Ethics and Integrity Adviser that the Commission should have the following roles:

    - *to promote recognition, both publicly and amongst holders of public office, of the need for integrity in ACT public administration;*
    - *to periodically review and report to the Assembly on the effectiveness of existing ACT institutions and mechanisms insofar as they impact on integrity in ACT public administration;*
    - *to develop and publish recommended best practice standards for integrity in ACT public administration;*
    - *to provide integrity advice to those ACT public office holders who seek it;*
    - *to act as a "clearing house" for the lodgement of complaints about a lack of integrity in ACT public administration - complaints so lodged would then be referred to the ACT institution best equipped to investigate and resolve those complaints;*
    - *to refer to other ACT institutions of its own motion concerns it may have about a lack of integrity in ACT public administration;*
    - *to monitor the investigation and resolution of matters so referred and of complaints lodged directly with other institutions;*

21. However, I do not agree with the view that the Commission should be limited to investigating complaints only when there is no existing institution with relevant jurisdiction or investigatory power or when satisfied that an existing institution is not addressing a complaint as effectively or strenuously as it should. There would be few, if any, complaints of public corruption that could not be investigated by some institution or other. At least the more serious forms of corrupt conduct almost invariably involve criminal activity which could be investigated by the Australian Federal Police and/or other law enforcement agencies. Allegations of corruption may also be investigated by a variety of statutory officials and other institutions, including the Public Sector Standards Commissioner, the ACT Auditor General, the ACT Ombudsman, and, if made against Members of the Legislative Assembly, by the Commissioner for Standards. The work of the Commission would be seriously hampered if it were obliged to wait until any other institution authorised to investigate a complaint proved unwilling to do so or failed to

address the issues as effectively or strenuously as it should. Such a restriction would inevitably force the Commission to accept lengthy delays and then intervene on the grounds that the other investigating institution lacked competence or resolution. This might be seen as patronising, if not insulting, and it would be unlikely to foster perhaps much-needed co-operation.

22. If the Commission is to become a specialist organisation, with investigative powers denied to other law enforcement agencies, it should be able to respond to any apparent instance of serious or potentially serious corruption. Whilst there is an obvious need to avoid unnecessary duplication of work or demarcation disputes, it should not be relegated to last place on any investigative "pecking order." It might well be content to leave the investigation of many allegations of corruption to the AFP or some other law enforcement body, but, it should be free to take over the investigation of any allegations of relevant misconduct at any time Queensland Integrity Commissionerif satisfied that it might be able to conduct or direct the investigation more efficiently or effectively.

23. This need not mean that the police or other investigative officers who have been working on the case would necessarily be excluded. In taking over an investigation, the Commission might well take the view that the police should be invited to continue to pursue their existing lines of enquiry, subject to the Commission's direction and augmented, where appropriate, by the use of the Commission's special powers. The Commission should also be free to draw upon the advice and assistance of other agencies with special knowledge or expertise in relation to issues raised by any particular complaint. It is true that some police officers might resent such a take over, but such investigative co-operation seems to have been a long standing practice in NSW. Indeed, section 16 of the ICAC Act expressly requires ICAC to, as far as possible, work in co-operation with other law enforcement agencies in relation to the investigation of corrupt conduct. Whilst I doubt that such a mandatory direction is really necessary, a comparable provision might make it clear that such cooperation is also expected in the ACT. If course, genuine cooperation may require more than the mere identification of a statutory requirement of this kind, but I would expect that ongoing discussions between the Commissioner and the ACT Chief Police Officer would be sufficient to ensure that any initial objection or resistance is soon overcome.

24. On the other hand, there may be cases in which the Commission forms the view that the involvement by another institution should be terminated. There could be number of reasons for such a view, including concern about an apparent conflict of interest, a judgment that the existing investigators are not sufficiently objective or a fear that the integrity of the investigation might be compromised by leaks of information about matters such as the impending execution of search warrants.

25. I agree that the Commission should be required to report to the Assembly at least annually and note that all of the comparable interstate bodies submit annual reports. It might also be prudent to reach agreement about any matters which the Assembly should be notified immediately.

The application to Members of the Legislative Assembly

26. The Clerk of the Legislative Assembly has rightly cautioned that the Commission should not be authorised to investigate or to form judgements about matters which properly fall within the exclusive province of the Assembly, such as possible contempts of the Assembly and breaches of standing orders or Assembly resolutions, including the code of conduct.

27. Of course, as the Clerk concedes, Members of the Assembly should not be wholly beyond the reach of the Commission's reach. On the contrary, the Commission should clearly be entitled to investigate any allegations of fraud or other offences of dishonesty that may be made against sitting or former Members.

28. Even in such cases, any existing protocols, such as the memorandum of understanding between the Assembly and the AFP concerning search warrants, should be honoured at least until new arrangements can be agreed.

29. However, the concept of corruption is usually defined very widely. For example, the definition in section 8 the ICAC Act extends, inter alia, to conduct involving "a breach of public trust" or "the misuse of information" acquired in the course of official functions. The breadth of the power that would otherwise be conferred by this section is qualified by a number of provisions in section 9, the most relevant of which provide that:

    - conduct does not amount to corrupt conduct unless it could constitute or involve, a criminal or disciplinary offence, grounds for terminating the services of a public official or "in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct;"

    - conduct by a Minister or MP of the kind described in section 8 is not excluded by this section if would cause "a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute"; and

    - ICAC may not include a finding or opinion that a specified person has, by conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless it constitutes a breach of a law and that law is identified in the report.

30. The last mentioned provision does not create a very high threshold. It is not suggested that the breach of the law must be criminal in nature, serious, or even intentional and it is not difficult to imagine minor breaches of the *Electoral Act* and other statutes that would not really justify the pejorative description "corrupt".

31. The overall scope of the these provisions would seem to permit ICAC to question and make findings about issues that have long been regarded as matters for elected

parliaments alone. It also raises many questions of interpretation. What is the ambit of the phrase "a breach of public trust" when applied to the political arena? And is that a judgment that should properly be made by an appointed official, however eminent, rather than by a standing committee of the parliament? What constitutes a "misuse of information"? There has recently been an energetic debate about that issue in relation to information supplied to Centrelink. If there had been a Commonwealth body like ICAC, should it have been required to enter what was essentially a political fray? What of the ACT? Of course, any statements made in the Assembly are subject to privilege, but there are few issues which do not lead to other public statements. Should a Minister who reveals certain information outside the Assembly be subject to an investigation about the stated motivation for the disclosure? What would be a "substantial breach" of the Code of Conduct? And is this not a judgement that would better be made by the Assembly? Whatever the perceived need for such extensive provisions in NSW, I can see no need for them to be echoed in the ACT legislation.

32. Whatever view is taken of this issue, some issues still have to be resolved by the Assembly. For example, section 15 of *The Australian Capital Territory (Self-Government) Act 1988* provides that a Member with direct or indirect conflict of interest may not take part in a discussion or vote on a relevant issue and that any question about the application of this provision must be decided by the Assembly. The approach adopted in the ICAC Act would also leave complaints of other minor breaches of the *Code of Conduct* to the Assembly. The only question is whether any allegations of more serious breaches, not involving potentially criminal conduct, should be referred to the Commission rather than to the Commissioner for Standards.

33. One might ask whether this would really matter. In either event, the allegations would be duly investigated by an independent person, presumably with some experience in the resolution of legal and ethical issues. However any report that a Member has been referred to what will be widely understood as an anti-corruption body might lead to impressions that he or she has been accused of fraud, bribery or other forms of dishonesty when, in reality, the allegations may actually be much less serious. Since the Commission may need to give priority to the most important allegations, the investigation of such less serious complaints could be delayed and this could jeopardise the careers of Members, especially if facing re-election under a cloud of perhaps unfounded suspicion. There could also be other unexpected consequences. At best it would involve the use of the proverbial sledgehammer to crack a nut.

34. Consequently, I agree with the Clerk of the Assembly's submission that allegations against Members not involving criminal dishonesty should continue to be dealt with by the existing arrangements, subject to some modification of the present system of referral to the Commissioner for Standards. This is explained with commendable clarity in the Clerk's submission and I will not attempt to traverse the same ground in this submission. The central points that I would make are that:

- there is an existing system in place for promptly dealing with allegations of impropriety against Members;

- it involves an impartial investigation and assessment of the allegations by an independent officer, currently a former Supreme Court judge;

- it permits the allegations to be addressed in a timely and efficient manner;

- reports of the investigation are provided to the Standing Committee on Administration and Procedure and are usually made public;

- the Standing Committee considers the reports and, if necessary, determines what action should be taken against the Members and makes appropriate recommendations to the Legislative Assembly;

- the Standing Committee also resolves any issues of confidentiality that may arise; and

- the ultimate decision making role remains in the hands of the Assembly.

35. In short, the system is working well and has a number of significant advantages over any scheme in which complaints against Members would be sub-divided, with some alleged breaches of the *Code of Conduct* being investigated by the Commission and others left in the hands of the Assembly itself.

36. The present arrangements already permit any complaint alleging conduct that seems likely to involve a criminal offence to be referred to the AFP for investigation. In future, complaints suggesting the likelihood of offences of dishonesty would instead be referred to the Commission, though, of course, any complainant would be free to approach either the Commission or the police directly.

The application to the judiciary

37. Somewhat similar considerations arise in relation to the judiciary. The Commission would, no doubt, be conscious of the fact that courts frequently deal with people suffering from mental health problems and that disaffected litigants may be left with lingering resentment against those who decided the cases against them. That may result in the odd spurious allegation. Nonetheless, the Commission should clearly be entitled to investigate any allegations against judges or magistrates of corruption involving criminal acts of dishonesty.

38. Any allegations of judicial impropriety not involving suggested criminality should be referred to the Judicial Council, a body established by an amendment to the *Judicial Commissions Act 1994* in 2015 and, if considered sufficiently serious to potentially

warrant the judge or magistrate's removal office, should be referred on to the Judicial Commission.

What powers should the Commission have?

39. Despite some earlier misgivings as to some of the approaches apparently taken by ICAC in recent years, I suggest that, subject to the issues raised elsewhere in this submission, the Commission should have broadly similar powers to those presently defined in the ICAC Act. That Act has recently been the subject of extensive reviews. Following the widely reported controversy concerning ICAC's ill-fated attempt to investigate the conduct of Margaret Cunneen SC, the Act was amended to retrospectively validate certain investigations and an independent panel, consisting of the Hon. Murray Gleeson AC and Mr Bruce McClintock SC, (the Joint Committee') was appointed to review its jurisdiction. The Independent panels's report,[2] was followed by two further reports written by ICAC's independent inspector, the Hon. David Levine AO RFD QC, one concerning actions taken in relation to Ms Cunneen and the other concerning the functioning of the ICAC more generally.[3] The reports were then reviewed by the Committee on the Independent Commission Against Corruption, a joint committee of the New South Wales Parliament ('the Joint Committee') which made extensive recommendations.[4] The Act was further amended after these successive reviews and now contains additional provisions, some of which are intended to ensure that those at risk of adverse reports are treated fairly. I have been unable to ascertain whether all of the Joint Committee's recommendations have yet been adopted as, despite the miracles that can usually be wrought in cyberspace, I have had some difficulty in gaining remote access to any very recent amendments to the regulations. In any event, despite the attention that has been lavished on this statute, there are still some issues that I believe warrant further consideration.

40. It is the obviously balance between the need to ascertain the truth and the need to avoid unfairness that is the subject of most controversy in relation to commissions of this kind. In my opinion anyone at risk of adverse findings should clearly have certain basic rights, including:

    - the right to be informed of the nature of any allegations against them and the basis for such allegations;

    - the right to legal representation;

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[2] The Hon. Murray Gleeson AC (Chair) Mr Bruce McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption - Report*, 30 July 2015.

[3] Hon. David Levine AO RFD QC, *Report to the Premier: The Inspector's Review of the ICAC*, 12 May 2016, http://www.oiicac.nsw.gov.au/assets/oiicac/reports/other-reports/Report-to-Premier-Inspectors-Review-of-the-ICAC.pdf.

[4] Joint Committee on the Independent Commission Against Corruption, *Review of the Independent Commission Against Corruption: consideration of the Inspector's reports*, Report 2/56 – October 2016.

- the right to test the evidence by cross-examination;
- the right to maintain the privilege against self-incrimination, at least in the absence of some protection against any use of the relevant disclosures in subsequent criminal proceedings;
- the right to call evidence in response;
- the right to maintain legal professional privilege; and
- the right to adequate reasons for any adverse finding.

41. Whilst the maintenance of these rights seems relatively uncontroversial, ICAC and similar bodies in other states have been given special powers to require people to attend, produce documents and be interrogated under oath. Moreover, ICAC is authorised to hold public hearings at which potentially damaging allegations against people who have not been charged with any offence may be made both by witnesses and by counsel assisting the Commissioner. These powers effectively override some of the other rights that are normally enjoyed by people subject to investigation or involved as defendants in conventional criminal proceedings (see below).

Compulsory interrogation

42. The practice of compulsory interrogation under oath is not, of itself, controversial. Witnesses are routinely forced to attend courts in response to subpoenas or summonses, called to give evidence and asked questions they are required to answer. However, whilst a party to a civil case may be required to answer written questions ('interrogatories') and to very the truth of the answers by affidavit, the privilege against self-incrimination is generally well-entrenched in Australian law. Hence, police officers are required to warn suspects that they are not required to answer questions and that any answers they do give will be recorded and may later be used in evidence. Courts may now require witnesses to answer questions that may incriminate them, though the statutory provisions that permit such compulsion invariably offer them some protection by preventing their answers from being used against them in subsequent proceedings [see, for example section 128 of the *Evidence Act 1995* (Cwth)]. However, such provisions do not usually permit prosecutors to force potential defendants into the witness box.

43. In contrast, ICAC and other similar bodies may summons people against whom complaints of corrupt conduct have been made to give evidence and answer even the most potentially damning questions. Their claims of privilege against self-incriminations may be overridden and they may instead be left to rely upon the limited protection proved by section 37 of the ICAC Act or some comparable provision. This means that evidence of their compulsory disclosures cannot be used against them in any criminal proceedings that may be brought against them, but it does not, of course,

protect them from the potential impact of an eventual finding that they have acted corruptly.

44. It may be argued that earlier generations managed to enforce the criminal law and maintain due standards of integrity without such intrusive procedures. The proceedings can result in neither convictions nor orders for the restitution of dishonestly obtained funds, yet those against whom allegations are made are effectively stripped of rights they would enjoy in criminal or civil trials. Furthermore, since the evidence obtained from them under compulsion will be inadmissible at any subsequent trial, the procedure is unlikely to strengthen the prosecution case against them. The findings may, however, create a risk of unfair prejudice. These concerns should not be lightly dismissed. People should not have to face trial fearing prejudgement by jurors who know that ICAC has already made a finding that they have acted corruptly. Of course, juries strive to be fair and they are usually directed to ignore anything they may have read about the case, but impressions formed from such apparently authoritative sources are not easily dispelled.

45. However, compulsory interrogation of this kind is a valuable tool in the hands of those charged with seeking to obtain the truth and, as mentioned earlier, corrupt conduct is often undertaken by means that may be difficult to uncover by conventional means of investigation. Hearings conducted by the Commission should not be seen as merely some form of pre-trial proceeding intended to improve the prospects of conviction. It is intended to expose past and present corruption and to provide information that will help authorities prevent similar conduct in the future.

46. The risk of unfairness may be ameliorated, though not overcome, by ensuring that those against whom complaints have been made are given due notice of the issues likely to be raised and permitting them to be legally represented so that their own version of the relevant events is presented with clarity and that any evidence against them is duly challenged in cross-examination.

47. In my view, the practice of compulsory interrogation may sometimes be justified by the public interest in uncovering and preventing corruption, at least when the proceedings are conducted behind closed doors. However, if prosecution is recommended or contemplated, then a brief statement that the matter has been referred to the Director of Public Prosecutions could be made and the findings otherwise suppressed until after any trial.

Public hearings

48. Different considerations arise in relation to public hearings where the allegations are aired in open court and perhaps recounted in the media. This gives rise to an inevitable risk that the reputation of innocent people may be effectively destroyed and their careers brought a shuddering halt. It also creates a real risk of causing lasting prejudice to their prospects of subsequently obtaining a fair trial. Such risks are often glossed over by people who are anxious to insist that "where there is smoke there is fire" or are naively

confident that the anyone wrongly accused will be duly vindicated. However, as a number of high profile Australian cases have demonstrated, the risk of wrongful conviction cannot be dismissed as a merely theoretical or fanciful possibility and, sadly, reputations are not easily restored, even after acquittals or rulings amounting to complete exoneration.

49. It is true that reputations may also be damaged by false or mistaken allegations aired in other public proceedings, such as inquests and committal proceedings, that do not result in any final resolution of the allegations by conviction or acquittal. That would not, of itself, offer any obvious reason to tolerate similar risks in public proceedings by the newly formed Commission, but there are other considerations that may be weighed in the balance:

- The maintenance of public integrity requires the exposure of corruption, not only to convict the guilty, but also to deter other potential offenders and alert potential victims of the nature of the risks they may face and of the need for vigilance. Evidence of actual wrongdoing revealed in public hearings may capture the attention and imagination of people who might otherwise have remained unmoved by the more abstract language of formal reports and hence serve these functions more effectively.

- Public confidence in the integrity and fairness of the proceedings, in which people give evidence about allegations of corruption within the public sector, may be more effectively maintained if they are open to public scrutiny rather than if conducted behind closed doors.

- Press coverage of such hearings may prompt other potential witnesses to come forward and provide further evidence as to the truth or falsity of the allegations. This may often tend to confirm the truth of the allegations, but there are cases in which it may lead to a person's exoneration. I can recall one case when, as a judge, I upheld an appeal after a member of the public read a report of the initial conviction, came forward and gave unchallenged evidence to the effect that he had witnessed the incident in question and that the appellant had not been at fault.

- Public awareness of the issues may also prompt people to provide information that leads to further enquiries, whether in relation to the allegations already being investigated or into other incidents or patterns of corruption. That may occur because reports of the existing proceedings have jogged their memories or made them realise the potential significance of information they had previously thought unimportant or because they have been encouraged to believe that their evidence will be taken seriously.

- The most lasting damage to reputations is likely to be caused by published findings, whether made after a public hearing or closed proceedings.

- Some people accused of misconduct may actually prefer a public hearing. When the allegations have already been reported, perhaps in conjunction with reports of suspension from duties, an innocent person may feel that a public hearing is likely to offer the only effective means of vindication that may be available.

50. Of course, there could be many circumstances in which the Commission would want such hearings to remain behind closed doors. For example, investigators might believe that the transactions being examined are instances of more widespread patterns of criminal activity and fear that premature publicity might permit other offenders to destroy evidence or otherwise cover their tracks.

51. There might also be circumstances in which the Commission might prefer to have only some of the evidence revealed in a public hearing. Even in criminal and civil trials there are well recognised exceptions to the principle that all of the evidence should be given in an open courtroom. Judges retain discretions to take some evidence "in camera" (that is behind closed doors) whilst conducting the balance of the proceedings in public. This may be done for a variety of reasons, including the protection of vulnerable witnesses.

52. Following the proceedings against Margaret Cunneen SC, the ICAC Inspector made a submission that ICAC's power to conduct public hearings be abolished. The Joint Committee considered, but ultimately rejected, this submission. Despite the validity and importance of the concerns the Inspector expresses, I think the Joint Committee was right to reject the imposition of an absolute prohibition on such hearings.

53. In my view, the public interest in the benefits that may be obtained from such hearings should be balanced against the potential risk of harming innocent people and this would be precluded by the inflexible application of a rule of that kind. The ACT legislation should instead provide that hearings be conducted in private session unless the Commission is satisfied that a public hearing is reasonably required. Others have argued that public hearings should only be permitted in exceptional circumstances. In any event, the Commission should retain some discretion to depart from this prima facie principle if satisfied that it is warranted by the public interest. In deciding whether to exercise that discretion, the Commission should be guided by a careful appraisal of competing factors, such as the nature of the allegations, the apparent strength of the evidence, the likelihood of substantial benefits ensuing from any resultant publicity and the potential vulnerability of those against whom the allegations have been made. In an appropriate case, it may also be possible to reduce the risk of unwarranted harm to a suspect required to give evidence at a public hearing by non-publication orders, whether relating to specified parts of the evidence or limited to his or her names and other identifying information. Some would no doubt protest that this would negate the deterrent effect of "naming and shaming" wrongdoers, but the Commission is intended to be an investigative body, not a court empowered to determine guilt and impose punishment, and the orders could be expressed to remain in force only until any subsequent criminal trial has been completed.

54. There is, however, a further question: should the decision to hold a public hearing be made by the Commissioner alone or should the responsibility be shared by others? The NSW Joint Committee accepted suggestions by both Mr McClintock and former ICAC Commissioner, Dr Irene Moss AO, that public confidence in the quality of any decisions to invoke the more invasive powers of ICAC would be enhanced if they were made by a panel rather than by a single Commissioner. The Joint Committee ultimately decided that the responsibility would in future be shared by the Commissioner and two part time Assistant Commissioners, concluding that:

> *Decisions to progress to a compulsory examination or public inquiry have grave consequences for the individuals concerned and it is essential that they be given appropriate weight. For this reason, the Committee considers that these decisions should no longer be made by a sole Commissioner. Instead, a decision to conduct compulsory examinations or public inquiries should require the majority approval of the proposed three member Commission.*[5]

55. I am not persuaded that the ACT requires assistant Commissioners, but there is much to be said for the view that decisions capable of destroying a person's reputation and career should not be taken without due consideration and other provisions for joint responsibility could be made. For example, a committee, consisting perhaps of three members, preferably including at least one former judge, could be established to make the final decision as to whether a public hearing would be permitted in any particular investigation.

Should there be an effective right of appeal or review?

56. The NSW Joint Committee also rejected a proposal by the ICAC Inspector for a protocol which would have enabled anyone acquitted of charges based upon the same or similar facts as those alleged in an adverse ICAC finding to make an application to the Supreme Court for an order requiring the finding to be expunged from the record or set aside. The Joint Committee observed that an acquittal does not demonstrate an absence of guilt; merely the absence of proof beyond reasonable doubt. That is true, but the acquittal does leave the presumption of innocence remains and, it has sometimes been argued, is strengthened. The joint committee was on firmer ground in observing that ICAC makes findings on the balance of probabilities whilst in a criminal trial the prosecution must prove guilt beyond reasonable doubt. It also correctly observed that the evidence relied upon at a trial may not be the same as that supporting the relevant ICAC finding and cited Mr McClintock's example of cases where people under compulsory questioning admitted corrupt conduct, but could not be successfully prosecuted because the admissions were not admissible at trial. Conversely, however, there may be cases in which people called to give evidence a trial admit that evidence

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[5] Joint Committee on the Independent Commission Against Corruption, *Review of the Independent Commission Against Corruption: consideration of the Inspector's reports*, Report 2/56 – October 2016 at paragraph 1.4

they had earlier given to the Commission was false or mistaken. I have been involved in trials during which this occurred.

57. The Joint Committee nonetheless rejected the proposition that someone subject to an adverse finding should have a right of appeal or a right to apply for a 'merits review' enabling a court to reconsider the evidence and determine whether the findings were duly supported. The Committee noted that the Supreme Court of NSW has jurisdiction to review findings made by ICAC, though only on grounds that the Committee described as:

    - *material error of law on the face of the record (which includes the reasons given for the decision);*
    - *the reasoning is not objectively reasonable and the decision could not have been reached by a reasonable person acquainted with all material facts and having a proper understanding of the statutory function, or was not based on a process of logical reasoning from proven facts or proper inferences;*
    - *a finding is not supported by any evidence whatsoever;*
    - *relevant matters have not been taken into account or irrelevant matters have been taken into account; or*
    - *a material denial of natural justice.*

58. The Joint Committee seemed to think that this was adequate. It cited the report of the Independent Panel, which observed that ICAC does not make judicial decisions, but merely reports its findings and opinions, and suggested that the introduction of a merits review "would confuse judicial and administrative functions and would increase misunderstandings as to the ICAC's role."[6]

59. It is true that the ICAC is an administrative rather than judicial body. It neither convicts nor acquits people of criminal offences and it does not make final decisions that directly affect their status or property; it merely investigates and reports its findings. However, that seems to be reasonably well understood by most members of the community, who would have read of well-known figures being subject to adverse ICAC findings and later being tried in criminal courts. If there is any substantial risk of confusion, it arises from the nature of the proceedings. ICAC conducts hearings in which witnesses are called and cross-examined, counsel make competing addresses and findings are made as

[6] Joint Committee on the Independent Commission Against Corruption, *Review of the Independent Commission Against Corruption: consideration of the Inspector's reports*, Report 2/56 – October 2016 at paragraph 2.10.

to whether allegations have been sustained.[7] Such activities are not undertaken by other investigative bodies, such as police forces,[8] and they may be seen as indicia of a court.

60. Whilst there may be some arguable justification for the common approach of limiting rights of review from other forms of administrative findings or decisions, administrative findings rarely result in people being publicly branded as corrupt. I suspect few non-lawyers understand much about the different types of appeal or review and that most would simply assume that anyone whose reputation has been destroyed by such a finding should have an effective right of appeal. I doubt that this would cause many people to confuse judicial and administrative functions or even think about the distinction in this context. On the contrary, I think that most people would be appalled to think that quibbles about the nature of the proceedings should lead to the denial of effective means of redress for mistakes likely to have such serious implications for people who might be innocent of any wrongdoing. Furthermore, the practice of permitting courts to set aside erroneous findings if based on some types of mistake but not on others is itself confusing and likely to be seen as obviously unfair. One need only imagine a barrister explaining the outcome of such an approach to a distraught client: "Yes the judge agreed that the decision was wrong and that you were innocent, but the mistakes don't fit into the right legal pigeonholes, so you will have to remain forever branded a thief. Too bad about your career and reputation."

61. It might perhaps be thought that such limitations on the right of review would keep potential floodgates closed and hence save time and money. That may be a factor in some wholly different contexts, but, at least in the ACT, the number of potentially reviewable findings made by the Commission is likely to be very small and the limited nature of the grounds of review permitted by provisions such as that contained in the ICAC legislation rarely shortens the hearings. On the contrary, they may add to the complexity and difficulty of the judgments that have to be made. Even when the judge may recognise that the decision is clearly wrong, he or she will still have to go on to consider whether any of the statutory criterion have been established or whether the incorrect decision must be sustained. Since non-lawyers, at least, may find it difficult to understand how a judge could be driven to such a seemingly bizarre decision, I should perhaps offer an example.

62. Grounds such as the second of those mentioned by the Joint Committee (see paragraph 57) are usually referred to as "Wednesbury unreasonableness" and the usual formulation requires that the decision be shown to have been so unreasonable that no reasonable

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[7] For example, they ICAC website currently contains an article headed, "ICAC finds former NSW Government minister and MPs corrupt,"

[8] Though similar observations could also be made of committal proceedings. However, they are not followed by overt findings of corruption. Magistrates who commit people for trial may explain why they are satisfied that a prima facie cases has been established and state that in their opinion a jury, properly instructed, could find the relevant offences proven, but they do not themselves make public findings that defendants have acted corruptly.

person could have arrived at it.[9] Hence, when this ground is relied upon, a judge will be unable to overturn an incorrect decision if forced to conclude that at least some other reasonable people in the position of the decisions-maker could have made the same mistake. The hapless person affected by such a decision or finding may protest that this is neither fair nor rational, but the judge will be obliged to explain that his or her hands are tied by the legislation. It will rarely be possible for such a litigant to demonstrate that the decision was so unreasonable that no reasonable person could have made it, and when a judge accepts that this has been established, the judgment is likely to be seen as a derisive denunciation of what might have been an uncharacteristic gaffe by a decision-maker the judge make know and respect. This can can cause lasting resentment. If a finding of the Commission were to be overturned on that basis, the judgment also undermine the standing of the Commissioner and the credibility of any subsequent findings.

63. If a mistake has been made, it should be corrected and, if as a consequence someone has been wrongly traduced as corrupt, they should be exonerated. In my opinion, that is unlikely to cause any confusion; it is what the community would expect. Hence, in my view, the legislation should provide for an effective right of appeal to the ACT Supreme Court.

64. On the other hand, I accept that the jurisdiction of the Court should only be available to provide remedies for people suffering substantial injustice as a result of such adverse findings. Hence, in my opinion, anyone seeking to appeal should be required to seek the leave of the Court. Such a requirement should ease the fears of those concerned that the there might be a flood of appeals that could give rise to unacceptable expense and delay, but also ensure that anyone with an arguable case is given a hearing decided on the merits.

Accountability

65. As previously mentioned, I agree with the view that the Commissioner should be responsible to the Assembly rather than to the Executive and, this should be done by reports to a Standing Committee, perhaps the Standing Committee on Justice and Community Safety. The obvious difficulty that may be faced by the Standing Committee is that few, if any, Members are likely to have the necessary legal experience to effectively call in question decisions taken by a Commissioner, who might be expected to be a former Supreme Court judge or some other eminent lawyer. In NSW, this problem is addressed by the statutory provision for the ICAC Inspector.

66. The Inspector is an independent statutory officer whose role and functions is to hold the ICAC accountable by:

- undertaking audits of the ICAC's operations to ensure compliance with the law;

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[9] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223 at 230.

- dealing with complaints about the conduct of the ICAC and its officers; and
- assessing the effectiveness and appropriateness of the ICAC's procedures.[10]

67. One would again expect such a role to be undertaken only by someone who was also a former Supreme Court judge or eminent lawyer, but there is no reason to suppose that it should be a full-time position. On the contrary, the position could be filled on a basis somewhat similar to that adopted in relation to the Commissioner for Standards or the Ethics and Integrity Adviser.

68. The availability of an Inspector would, I suggest, provide enhanced accountability and perhaps lead to some greater confidence in the integrity of the Commission. It would also assist the Standing Commission to make informed assessments about the Commission's performance. Of course, the Commissioner would be entitled to challenge any views expressed by the Inspector, but even if such disagreements were to occur, as they did in NSW over the handing of the Cunneen investigation, the relevant issues would be identified by the exchange of relevant correspondence and the Standing Committee given the benefit of the competing contentions. Accordingly, I recommend that the legislation provide for the appointment of an Commission Inspector.

Staffing and budgetary considerations

69. In NSW, the Joint Committee decided that ICAC staff should not fall within the Government Sector employment framework as it was thought that this might compromise ICAC's actual or perceived independence. There is much to be said for this view. Such a small small organisation would itself offer little scope for promotion and there might be some expectation that ambitious staff members might be reluctant to tread on the toes of people who might be able to influence their prospects of advancement in other areas of the public sector. Furthermore, as I discovered during an earlier life as the first ACT Director of Public Prosecutions, the established Public Service procedures and expectations are not always compatible with the needs of a new and independent body.

70. On the other hand, there would be obvious difficulties in creating a new staffing structure within a separate legal entity, though they could perhaps be largely overcome by a provision that staff of the Commission would enjoy the same rights and entitlements as if employed under the *Public Sector Management Act 1994*.

71. If such a step were to prove a bridge too far, then I would echo the recommendation of the ethics and integrity adviser that the Commission:

[10] See Part 5A of the the ICAC Act.

be supported by such staff as might be appointed by the Commissioner within resources appropriated by the Assembly and in respect of whom the Commissioner would have "head of service" powers comparable to those under the Public Sector Management Act.

72. The legislation should also give the Commission ample power to engage consultants and others by contract, such as that enjoyed by the Director of Public Prosecutions,[11] and, of course, the right to brief counsel.

73. It is difficult to make any reliable estimate of the staffing levels that may ultimately be required or of the likely financial needs of the Commission. Some limited guidance could, perhaps be derived from the budgetary position of the Tasmanian Integrity Commission. In its annual report for the year ended 30 June 2016, it revealed that it had had 15.8 full-time equivalent (FTE) staff members and a budget of $2.390,000. Tasmania is, of course, the state with the most comparable population, containing about 517,000 people compared to an estimated population of about 400,000 in the ACT.

74. Comparable reports in the other states revealed that:

- in NSW, ICAC currently had 110 employees and total expenditure of $26,906,000;
- In South Australia, the Commissioner Against Corruption had a staff of 51 people and expenditure of $9,700,000;
- In Victoria, the Independent Broad-based Anti-corruption Commission had a staff of 106 and expenditure of $31,992,000;
- In Queensland, the Crime and Corruption Commission had a workforce equated to 342.2 full-time equivalent staff and expenditure of $54,452,00; and
- the Corruption and Crime Commission of Western Australia had a staff of 130 and a 2015-16 budget of $32,000,000.

75. Whilst I am not in a position to provide an analysis of the reasons for such disparity, the differences do not seem to be wholly explained by differences in population, legal jurisdiction or disparities in the levels of fiscal wickedness amongst the states. In any event, I do not believe that much guidance can be gained by extrapolation from these figures, even if scaled back by reference to population size. There are other obvious differences between both the apparent needs and available resources of the ACT and those of larger jurisdictions. To take some obvious examples, the investigative reach of bodies like ICAC extends to corruption within municipal and shire councils and to issues concerning the granting of mining licences. Nonetheless, there may be much that

[11] See See section 31 of the *Director of Public Prosecutions Act 1990.*

can be learned from the experiences of similar bodies and a comparison of their strategies might usefully be undertaken by the new Commissioner and his or her staff.

76. However, the smaller size of the public sector and the more limited focus of the Commission might enable greater reliance upon co-operation with existing agencies. I would not suggest that the investigative role of the Commission be wholly delegated to the AFP or some other law enforcement agency. If the Commission is to be effective, it must retain due control over the investigations it pursues, but this may not require it to maintain substantial staffing levels. There would obviously need to be a nucleus of key people, such as an administrator with extensive experience in the ACT public sector, an experienced investigator, a forensic accountant and an expert in IT fraud, but it may be possible to co-opt staff from other agencies to work under the Commission's direction when required. Much would depend upon the level of co-operation that could be achieved and the measures that could be put in place to maintain due confidentiality and ensure none of those co-opted had any potential conflicts of interest.

77. The Commissioner will obviously need to forge a new organisation, guided perhaps by the experience of the existing interstate bodies, but with a fresh approach to achieving his or her statutory objectives within the ACT. In my view, the only viable option may be to appoint a Commissioner, permit him or her to engage a few key staff members such as those mentioned, and request further funding from time to time as required. However, there may need to be special arrangements to prevent such requests from becoming mired in bureaucratic processes and the necessary funding consequently delayed.

78. In my opinion, the success of the Commission will depend substantially on the expertise and personal qualities of the Commissioner and his or her capacity to forge a stream-lined and efficient organisation. In the long run, I suspect it will be considerations of this kind that will most effectively contain the overall cost of the organisation.

Other

79. Real independence will require more than statutory provisions authorising the Commission to undertake certain specified activities independently. It will also require the provision of practical arrangements that will permit the Commissioner to act efficiently and decisively without having to repeatedly go cap in hand to others for funding or for approval to engage the necessary staff or otherwise obtain the necessary facilities.

(The Hon Dr) Ken Crispin QC
20 August 2017