The ACT Integrity Commission

*Dennis Cowdroy**

It is an honour to present the Michael Will Address to the Australian Institute of Administrative Law. I know that traditionally such an address is given to honour the long and outstanding service of Michael Will, an eminent practitioner of the Australian Capital Territory (ACT). This is an illustrious occasion, and I hope that the presentation relating to integrity commissions will be both informative and inspiring.

I give this address at a time of great public interest in integrity commissions, not only within the ACT but also nationally. We have all recently witnessed the work of an integrity commission in graphic form. My direct concern is the newly created integrity commission of the ACT, and I now provide in detail some of the history and purpose of this new commission's operations.

In 1908, the Parliament of the Commonwealth of Australia chose the site for the national capital and in 1911 the 'Territory for the seat of Government' was established. It was named the Federal Capital Territory until 1938, when it became officially the Australian Capital Territory. Until 1989 the ACT was administered by the Commonwealth Government.

In the exercise of its powers, the ACT legislature has enacted the *Integrity Commission Act 2018* (ACT). The Act came into operation on 1 July 2019. Its purpose is to establish the ACT Integrity Commission and for other purposes.

The objects of the Act are set out in s 6:

> **6 Objects of Act**
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> a. Providing for the identification, investigation and exposure of corrupt conduct; and
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> b. Providing for the commission to prioritise the investigation and exposure of serious corrupt conduct and systemic corrupt conduct; and
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> c. Achieving a balance between the public interest in exposing corruption in public administration and the public interest in avoiding undie prejudice to a person's reputation; and
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> d. Assisting in the prevention of corrupt conduct; and
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> e. Co-operating with other integrity bodies; and
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> f. Educating public officials and the community about the detrimental effects of corrupt conduct on public administration and the community and the ways in which corrupt conduct can be prevented; and
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> g. Assisting in improving the capacity of the public sector to prevent corrupt conduct.

* Dennis Cowdroy was the ACT Integrity Commissioner from 2019 until the end of 2020. This address was given at Canberra on 11 November 2020.

The Act fulfils the desire of the people of the ACT that a Commission be implemented to detect, deter and prevent corruption in government at all levels, including the judiciary, similar to that which exists in all other states of Australia and in the Northern Territory.

Imperceptibly, in the past 50 years we have undergone major changes in our legal system. For example, up to 1970 the courts could provide common law remedies or equitable remedies. However, one was required to select one or other of the jurisdictions and an action would fail if it was brought in the wrong jurisdiction. Now, at least in New South Wales following the introduction of the *Supreme Court Act 1970*, law and equity have been fused.

In the realm of criminal law, the introduction of the Criminal Code (Cth) has codified criminal offences and has had a substantial impact upon the complicated task of imposing sentences. At common law, the introduction of the *Trade Practices Act 1974* (Cth) provided a new ethos in commerce. Concepts such as 'misleading and deceptive conduct', where intent of the person making the statement was relevant, were novel. Hitherto, actions lay for fraud and misrepresentation, but such actions require very strict proof. The new legislation created a new regime for individuals and for corporations.

In administrative law, judicial review of administrative action was unheard of, and traditional remedies such as denial of natural justice or procedural fairness were the only way in which administrative action could be challenged. Concepts such as the doctrine of legitimate expectation were unknown. However, since the creation of the Administrative Appeals Tribunal by the *Administrative Appeals Tribunal Act 1975* (Cth), administrative law is now a major feature of our legal system.

But the law does not cease to develop. Since 1984 the concept of integrity commissions has been formulated. Integrity by public officials, members of Parliament and contractors to government are all under public scrutiny, particularly with the advent of electronic media.

The purpose of this address is to provide some history of the creation of integrity bodies and particularly the creation of the ACT Integrity Commission.

The ACT Integrity Commission was established by the *Integrity Commission Act 2018* (ACT) after extensive consultation by the ACT Legislative Assembly. An integrity commission had been foreshadowed as early as 1989, at the seventh day of the first assembly. Corruption is one of the greatest challenges to modern government. The foreword to the *United Nations Convention against Corruption* of 2004 succinctly states the dangers of corruption in government poses to democracies:

> Corruption is an insidious plague that has a wide range of corrosive effects on society. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality-of-life and allows organised crime, terrorism and other threats to human security to flourish.[1]

1 Opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005).

Integrity agencies

Common features of existing integrity commissions

Common to the legislation setting up each integrity body is a definition of 'corruption'. That definition incorporates the concept of dishonesty or improper conduct in public office; a breach of code of conduct (if such code exists); misusing information obtained in carrying out duties; behaviour that could be expected to lead to a criminal offence; a conduct that involves failing to manage adequately and actual or perceived conflict of interest; a breach of public trust; and the illegal unauthorised or otherwise inappropriate performance of public functions. It extends, for example, to collusive tendering, intentionally or recklessly providing false and misleading information in relation to various applications, misappropriating or misusing public resources, dishonesty obtaining or retaining employment or appointment as a public offer, bribery and similar conduct. It would include dishonestly using, for example, travel allowances and other allowances paid to public officials.

Creation of Australian integrity agencies

In Australia, the New South Wales Independent Commission Against Corruption (ICAC) was created in 1989. Thereafter, similar bodies were created in Queensland in 2001, Western Australia in 2003, Tasmania in 2010, Victoria in 2011, South Australia in 2012 and the Northern Territory in 2017. The ACT is the final Australian jurisdiction to initiate an oversight body in a recognition of the necessity of ensuring accountable and transparent government and government services for all citizens of the ACT. The ACT Legislative Assembly has drawn from the experience of other corruption agencies to formulate the model which it believes will best serve the ACT community.

The Select Committee for the proposed Integrity Commission of the ACT Parliament noted that all of the anti-corruption bodies created in the states and the Northern Territory had powers over the public sector — but not the private sector; that all possess coercive powers similar to royal commissions; that the overriding theme in the establishment of such bodies was the restoration and maintenance of trust in government and public administration; and all (except South Australia) were established following revelations of corruption — a perception that corruption is going unchallenged or that there were significant gaps within the existing integrity framework.

The Select Committee noted that the anti-corruption body in the Northern Territory had resulted from public pressure and questions of scrutiny of ministerial travel allowances, amongst other matters. They noted that there was a developing concept of a National Integrity System, advocated by Transparency International, which was seen to be an important factor in fighting corruption in society.

ACT model

The consideration by the Select Committee was the culmination of calls for an independent advisory committee against corruption foreshadowed on 1 June 1989 on the seventh sitting day of the first assembly. Then on 27 November 1991 a member of the Residents Rally presented the Public Corruption Bill 1991 to the Legislative Assembly. The Bill lapsed, but it

provided for the establishment of a committee to receive information relating to allegations of public official corruption and that of public authorities.

In 2016 concerns were expressed about relationships between developers and the government relating to land development. After calls from several political parties in 2016 following the general election, a proposal to advance the investigation was formulated.

Specific considerations

The Select Committee noted that the primary object of such a body should be the investigation, exposure and prevention of corruption and the fostering of public confidence in the integrity of the ACT Government. It noted that, according to some views, corruption could not be eradicated. However, the best form of mitigation of corruption lay in managing its deterrence, disruption and detection. It referred to the observations of a former ICAC Commissioner:

> The investigation and exposure of corruption is an extremely difficult task. Secrecy is at the core of corrupt conduct. Few paper trails are left, and false paper trails are created. Electronic Communications and continuously developing sophisticated technology are formidable means of concealing misconduct. The persons likely to be involved in large-scale corruption are usually experienced and astute and have deep pockets. They surround themselves with skilled lawyers, accountants and technical experts and are often protected politically. So, if corruption involving public office s to be fought effectively, specialist anti-corruption agencies are needed with special powers and resources.[2]

Extensive powers of investigation were required to deal with 'corrupt conduct' as defined in the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act). Further, arrangements would need to be implemented to ensure that the rule of parliamentary privilege was not infringed.

Care was required in determining the threshold at which a Commission can commence an investigation; that is, whether 'reasonable suspicion' was sufficient for this purpose. The Select Committee considered that such a concept was appropriate.

The Commission should have powers for the purpose of investigating, exposing, and preventing corruption as it considers necessary. Such powers would include the ability to apply for search warrants and engage in covert tactics including surveillance, undercover agents and other means to obtain necessary evidence. However, such measures should not become tools of entrapment.

Protocols for the determination of any complaint would be required, and a formal notification given of any decision concerning a complaint.

Issues of confidentiality to protect the safety of any person providing assistance to the commission would be required.

2 The late David Ipp AO, QC.

Jurisdiction

The Parliament of the ACT recognised that there were clear distinctions between government structures existing in other state agencies and those of the ACT. That is, the ACT blends together responsibilities of both territory government and local government. In other states, there is a clear division in the models of government.

The Select Committee recognised that:

- The proposed commission would need to have the ability to investigate with broad powers. Equally important was the consideration that the power should be proportionate and tempered by appropriate controls.
- The jurisdiction has attributes and characteristics specific to the ACT.
- Care would need to be taken before any other model from another jurisdiction is adopted.
- The proposed body should have broad responsibility, as it concerns government activities and public officials, but it should extend to the conduct of third parties — namely, private individuals, where such conduct affects public administration.
- The commission should have the power to conduct public hearings. It noted that reputational damage could result from unfounded claims and that care would need to be taken in the decision to conduct public hearings. It observed that in the ICAC (NSW) public hearings nearly always followed private investigations where a sufficient body of evidence existed of untoward conduct.
- Parliament should not be able to interfere with the day-to-day operation of the commission, lest Parliament compromise its independence.
- Protocols would need to be introduced to deal with vexatious complaints.

Safeguards

The Select Committee considered that it was necessary for the functions of the Commission to empower it to compel the production of documents or the giving of evidence which would otherwise be protected by legal professional privilege and privilege against self-incrimination.

The Commission would proceed in its investigations via an inquisitorial process and was not bound by the rules or practices of evidence. The Commission would be empowered to make findings of fact that corruption has occurred, but such finding is not to be taken as a finding of guilt. The Commission would not constitute a court and could not usurp the functions of a court. The Commissioner would not have power to make decisions of a disciplinary finding, for such a finding would transpose the Commission to a legal proceeding. The Commission should not have power to manage a mediation program.

Shortcomings in other agencies

In Queensland an inquiry was held into the proposed introduction of poker machines in that state. A company which manufactured gambling machines was not given notice of the intention of the Criminal Justice Commission (CJC) to make a report which affected the reputation of the manufacturer. The High Court held that, as a statutory body, the CJC, in preparing its report, was bound by the rules of protocol fairness; and that those rules had not been observed, resulting in a denial of procedural fairness.[3]

In *Greiner v ICAC*[4] the New South Wales Court of Appeal set aside a finding of the Commissioner of ICAC which founded the Premier had engaged in corrupt conduct in arranging for a political benefit to flow to a member of the Legislative Assembly. The Court found that the definition of 'corrupt misconduct' under the ICAC Act required a finding the conduct would constitute or involve criminal conduct not merely corrupt conduct.

Deficiencies in existing legislation have suggested the following are key provisions needed for any criminal justice body:

- The Commission should have power to take action for any contempt of the Commission (subject to parliamentary privilege).
- The Commission should be required to report publicly on its operations.
- The Commission should have the power to publicly report its findings resulting from any investigation, including findings of serious and systemic corruption and their foundations.
- The Commission should be empowered to hold both private and public examinations. Where a public examination is required, the Commission should provide a statement explaining why public interest outweighs the potential for prejudice or privacy arrangements.

Accountability and independence of the Commission

The Select Committee considered that the Commission should be subject to the oversight of an Assembly Oversight Committee. The Select Committee was of the view that the statutory head of the Commission should be an Officer of the Legislative Assembly. Further, there should be oversight by the Inspector.

The Select Committee recommended that the Commission appoint its own staff and be allocated a budget for its operations.

In October 2018 the Select Committee published a further report which, in summary, confirmed much of the earlier report and made further recommendations on specific issues. Its recommendations are contained in the *Integrity Commission Act 2018* (ACT).

3 Ainsworth v Criminal Justice Commission (1992) 175 CLR 564.
4 (1992) 28 NSW LR 125.

The Commission in operation

The Commission commenced its operations on 1 December 2019. Since that time, there have been 130 complaints lodged with the Commission. The complaints raise issues which, in some cases, do not constitute 'corruption' but, rather, grievances in the workplace or dissatisfaction with the operation of a system. However, many are the subject of investigation.

The Commission now has a staff of approximately 14, who are engaged in the investigation of complaints, assessment of complaints and reporting. The Commission operates with a full-time chief executive officer and a part-time Commissioner.

Strict regimes have been established relating to responses to complaints and reporting. It is expected that the Commission will shortly undertake private hearings and, where required, a public hearing will be held.

Recently there has been a graphic example of the operation of integrity commission by the holding of public inquiry in New South Wales into the business activities of a former state parliamentarian. The inquiry has led to discussion concerning the role of an integrity commission and whether public hearings, with the attendant potential damage to a person's reputation, should be held. While privacy is of paramount concern, especially under the *Integrity Commission Act 2018*, there is also some perceived public benefit in ensuring that issues of corruption in public office are ventilated as a deterrent to others. The holding of a public inquiry carries risks that a person's reputation will indeed be damaged. The ACT Integrity Commission has prepared a policy on reputational repair of damage. It is very mindful of damage that can be occasioned to a person as a result of its legitimate operation.

Further, the holding of a public hearing could potentially jeopardise a criminal trial arising out of the conduct which has been the subject of investigation and which has been ventilated publicly before the Commission. An adverse finding by the Commission on such a matter could severely affect the ability of a person adversely named to achieve a fair trial. It must be remembered that the Commission is not a court, yet a public pronouncement of corruption could be most damaging.

There are a several safeguards in the Act to protect the reputation of individuals, including but not limited to:

- confidentiality notices issues with Preliminary Inquiry Notices or Examination Summonses, which prohibit the discussion of the subject of preliminary inquiry or investigation, limiting the number of people knowing about the investigation or individuals involved in the investigation;
- the requirement in s 143(2)(b) that consideration be given to whether a public examination can be held without unreasonably infringing a person's human rights, which includes the right to privacy in s 12 of the *Human Rights Act 2004*:

12 Privacy and Reputation

Everyone has the right —

(a) Not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and

(b) Not have his or her reputation unlawfully attacked.

- the requirement in s 144 that the Commission notify the Inspector of the intention to hold a public examination, and the reasons for such examination;
- the right of a person appearing before the Commission to have a legal representative (s 152);
- the requirement of the Commission to tell a witness of their rights and obligations as stated in s 148(3) (I note that the Act says s 148(2), but this is a typographical error the Parliamentary Counsel is correcting using her editorial power under the *Legislation Act 2001*) — this ensures a witness knows what they are likely to be questioned about, and their legal representative may seek a suppression order;
- the ability of the Commission to issue a suppression order prohibiting or restricting the publication of information or evidence given during a public examination if the Commission considers it necessary to prevent prejudice to the person's reputation (s 154(1)(a));
- the requirement that the Commission develop reputational repair protocols (s 204) to account for certain information being included in an investigation report, special report or commission annual report; and
- the rules of natural justice and procedural fairness are to be followed by the Commission.

Administrative law

Since the Integrity Commission is a creature of statute, and since it is not a court, all of its actions are susceptible to supervision by administrative law. In respect of each of the sections referred to hereunder, there is scope for the operation of administrative law and remedies. Any omission to follow the statutory requirements of the Act could result in administrative law review:

- Sections 69–71 of the Integrity Commission Act require the Commission to dismiss, refer or investigator corruption report.
- Section 72 requires a complainant to be kept informed by the Commission and s 74 requires the Commission to notify an informant who is a head of a public service sector entity who has made a mandatory corruption report, to be kept informed.
- Part 3.5 gives power to the Commission for entry, search and seizure. Where a claim for privilege is made in answer to a search warrant, the claim must be referred to the Supreme Court: s 128.

- Section 115 requires an investigator in exercising their power that affects an individual to first show identity card.

In Pt 3.6, Commission examinations:

- Section 142(1)(a) requires the Commission to comply with the rules of natural justice and procedural fairness.
- Section 142(2) requires the Commission to make guidelines about the conduct of examinations described as the 'examination conduct guidelines', which are a notifiable instrument (s 142(3)).
- Section 143 states that the Commission may hold examinations in public or in private and the Commission must decide whether it is the public interest to do so (s 143(2)).
- Section 144 requires the Commission to notify the Inspector of a public examination by giving not less than seven days notice.
- Section 146 states that the Commission may give directions about the people who may be present during an examination or part of an examination or who must not be present at such an examination (s 146(1) and (2)).
- Section 146(a) states that a direction must not prevent the presence, when evidence is being taken of an examination, of a lawyer representing the person attending in accordance with an examination summons.
- Section 147, on the power to issue an examination summons, states that the Commission may, *if it is satisfied that it is reasonable to do so*, issue a summons to a person requiring a person to attend at a stated time and place to appear before the commission to give evidence or produce documents (s 147 (1)).

In deciding whether to issue the examination summons the Commission must have regard to whether the production of the document is necessary for the investigation; and whether it is reasonable or practicable to obtain information in any other way (see s 147(2)(a)–(e)).

Examination summons

Section 150 empowers the Commission to require a person to attend or otherwise comply with an examination summons. The summons must be served seven days before the date of the attendance (s 150(1)). If it cannot be served personally, the Commission may apply to the Supreme Court for an order the summons be served in another way.

Legal representation

Section 152(1) provides that a witness may be represented at an examination by a lawyer.

Section 154 provides that the Commission may issue a suppression order prohibiting or restricting publication of any information or evidence given during a public examination. Section 155 renders it a criminal offence if a suppression order is contravened.

The Commission may apply to a magistrate for the issue a warrant to arrest a person if the Commission believes that the person has been given an examination summons and has failed to appear (s 159(1)). A magistrate may issue an arrest warrant if satisfied of these requirements and also that reasonably practicable steps have been taken to contact the person and that the issue of a warrant is in the interests of justice (s 159(2)). Section 159(3) contains the considerations that must be given in determining whether it is in the interests of justice to issue an arrest warrant. Section 160 describes a procedure where a witness fails to appear after the issue a warrant.

Section 162 requires an application of the Supreme Court by the Commission to determine privilege.

A person is in contempt of the Commission of the person has been served with a preliminary enquiry notice and refuses or fails to produce the document or thing or has been served with an examination summons and fails to attend (s 166(1)(a) and (b)). Contempt also arises where a person gives an answer which is false misleading or obstructs or hinders the Commissioner in the performance of the Commissioners functions at an examination (section 166(1)(c) and (b)). The Commission may apply to the Supreme Court for the person to be dealt with in relation to the contempt.

Part 3.7 deals with both privilege against incrimination and parliamentary privilege.

Conclusion

The ACT Parliament has done something: after the most careful and incisive deliberation, it has laid the foundation for its Integrity Commission. The debates of Parliament and the recommendation of the Select Committee demonstrate that the Parliament was anxious to ensure that there be put in place the best possible model Commission for the residents of the ACT.

It is not a simple task to introduce such an innovation. The drafters of the Integrity Commission Act foresaw that there would need to be a staged process for the introduction of the new Commission. The appointment of the Commissioner was made utilising other legislative powers of the ACT prior to the coming into operation of the Integrity Commission Act. The legislature anticipated that it would be unworkable for the proposed Commission to commence operations until it was properly staffed and established.

The legislature also made provision for a degree of retrospectively, to include within the powers of its new Commission the ability of the Commission to deal with matters which might constitute corrupt conduct since the operation of self-government (see s 8 of the Integrity Commission Act).

The legislature was also clearly conscious of the shortcomings which have emerged in the operation of other similar integrity bodies within Australia. For this reason, the Integrity Commission Act contains significant details concerning the operation of the powers of the Commission. Further, the legislation is designed to ensure that a person's reputation will not be the subject of potential public ignominy unless there are sound reasons for the

Commission to embark upon public hearings and public findings which might be adverse to a person.

We must bear in mind the observations which appear on the wall of the library of the Supreme Court of the United Kingdom. They are: 'Injustice anywhere is a threat to justice everywhere. Whatever effects one directly affects all indirectly.' In English law, where an injustice was perceived to be done and the courts could not offer a remedy, it was open to the public to petition the British sovereign under a procedure known as Petition of Right. The motto for the inaugural Integrity Commission of the ACT contains the words used in such a petition — namely, 'Let right be done'. Those simple words convey the true purpose of the new Commission.