

Select Committee on an Independent Integrity Commission

Submission

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INTRODUCTION

The Australia Institute welcomes the opportunity to make a submission to the ACT Select Committee on an Independent Integrity Commission. The Australia Institute has examined the available evidence from the performance of anti-corruption commissions around Australia in order to inform the most effective design of an integrity commission in the ACT. Our research has found that the broad jurisdiction of an integrity commission, and its ability to hold regular public hearings will be critical to its success in exposing and investigating systemic corrupt conduct.

THE SUCCESS OF ANTI-CORRUPTION COMMISSIONS AROUND AUSTRALIA

Design features are critical to the success of an anti-corruption commission in fulfilling its role of investigating and exposing systemic corruption. In defining the scope of an integrity commission in the ACT, we urge the committee to take note of the evidence available from anti-corruption commissions operating in Australian states. We have compared the design and effectiveness of the NSW Independent Commission Against Corruption (NSW ICAC), the Queensland Crime and Corruption Commission (Qld CCC), the Victorian Broad-based Commission Against Corruption (Vic IBAC), the South Australian Independent Commission Against Corruption (SA ICAC) and the Tasmanian Integrity Commission (Tas IC). Our research finds that a broader definition of corrupt conduct and the execution of public hearings render NSW ICAC far more effective.

The report found that, from 2012-2016, NSW ICAC made corrupt conduct findings against 123 people, referred 76 people to the Director of Public Prosecutions (DPP) and held 28 public hearings. This is a significantly better performance than other state commissions. The Qld CCC made held no public hearings, made no findings of corrupt conduct, and referred 32 people to the DPP, while Vic IBAC held 4 public hearings, made no corrupt conduct findings and referred 6 people to the DPP. SA ICAC and Tas IC held no public hearings, made no corrupt conduct findings, and while SA ICAC referred 16 people to the DPP, the Tas IC made no referrals.¹

In addition to higher numbers of hearings and corruption findings, NSW ICAC also pursued investigations in systemic large scale cases, including ministers issuing corrupt mining licenses and major parties taking illegal donations. In contrast the Queensland

¹ Annual reports of NSW ICAC, Qld CCC, Vic IBAC, SA ICAC and Tas IC 2012-2016

CCC investigated minor fraud involving one or two individuals, including public servants lying on their timesheets or issuing dodgy drivers licenses.

A broad jurisdiction through a wide definition of corrupt conduct, and regular public hearings are critical to NSW ICACs success. These design features should be adopted by an ACT Integrity Commission.

DESIGNING THE ACT INTEGRITY COMMISSION FOR SUCCESS

Broad jurisdiction: the definition of corrupt conduct

As demonstrated by NSW ICAC, a broad definition of corrupt conduct in the jurisdiction of an ACT Integrity Commission is critical to ensuring success in investigating and exposing systemic corruption. NSW ICAC has the broadest definition of corrupt conduct of any state commission, allowing it to investigate a wider range of conduct.

NSW ICAC's definition of corrupt conduct has a wider list of conduct that could be considered to be corrupt, including key activities such as official misconduct, election bribery and obtaining financial benefit by vice engaged in by others. It also has a lower threshold for what pertains to corrupt conduct – which includes conduct that would result in a disciplinary action under any law. Qld CCC's definition limits corrupt conduct to that which would be a criminal offence or grounds for terminating services. In addition, NSW ICACs definition provides for criteria that are alternative ('or') rather than requiring that all criteria are met in a cumulative form ('and'), as stated in the Qld CCC Act.²

Official misconduct is a critical term in the NSW ICAC Act that allows the NSW ICAC to pursue many cases at a parliamentary and ministerial level that may otherwise not be investigated. Many cases of public interest have been investigated under this term, which covers cases of breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition. The full definition of corrupt conduct provided in the NSW ICAC Act is provided below:

² *New South Wales Independent Commission Against Corruption Act 1988 and Queensland Crime and Corruption Commission Act 2011*

8 General nature of corrupt conduct

(1) Corrupt conduct is:

- (a) 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, or*
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or*
- (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*
- (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.*

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),*
- (b) bribery,*
- (c) blackmail,*
- (d) obtaining or offering secret commissions,*
- (e) fraud,*
- (f) theft,*
- (g) perverting the course of justice,*
- (h) embezzlement,*
- (i) election bribery,*
- (j) election funding offences,*
- (k) election fraud,*
- (l) treating,*
- (m) tax evasion,*
- (n) revenue evasion,*
- (o) currency violations,*
- (p) illegal drug dealings,*
- (q) illegal gambling,*
- (r) obtaining financial benefit by vice engaged in by others,*
- (s) bankruptcy and company violations,*
- (t) harbouring criminals,*
- (u) forgery,*
- (v) treason or other offences against the Sovereign,*
- (w) homicide or violence,*
- (x) matters of the same or a similar nature to any listed above,*
- (y) any conspiracy or attempt in relation to any of the above.*

(2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

(a) collusive tendering,

(b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,

(c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,

(d) defrauding the public revenue,

(e) fraudulently obtaining or retaining employment or appointment as a public official.³

As well as the scope of corrupt conduct, the Queensland and NSW Acts have separate thresholds to what level of corrupt conduct is worthy of investigation. The *Crime and Corruption 2001 Act* (QLD) states that conduct will only be investigated if it would, if proven, lead to a criminal offence or grounds for dismissal.⁴ In its application, the interpretation of this by the CCC is narrowed to focus on criminal offences, raising a concern that the CCC is focussing on cases that could be pursued by the judicial system, rather than fulfilling its role as investigating and exposing corruption. This is demonstrated by the CCC's decision not to investigate certain cases stating 'the assessment found insufficient evidence to support the allegations or to raise a reasonable suspicion of a criminal offence.'⁵ This response also places the onus of evidence on the complainant. It is further demonstrated on the CCC website in its statement that 'the performance of the official duties of a person elected to office could not amount to corrupt conduct unless the conduct would, if proven, amount to a criminal offence.'⁶ The NSW ICAC Acts makes the same statement regarding criminal corruption but with an important addition – conduct can be investigated if it would result in a disciplinary offence. A disciplinary offence is defined as: any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.⁷ In practice, this allows NSW ICAC to investigate cases regardless of whether there is evidence of criminality from the outset. This often means that seemingly weak leads are investigated that uncover complex and serious cases of corrupt conduct.

³ *New South Wales Independent Commission Against Corruption Act 1988*

⁴ *Queensland Crime and Corruption Act 2011*

⁵ Queensland CCC, *Annual Report 2015-16* pg 42

⁶ CCC, *What the CCC investigates*, accessed 9th March 2017,

<http://www.ccc.qld.gov.au/corruption/what-the-ccc-investigates>

⁷ *New South Wales Independent Commission Against Corruption Act 1988*

A low threshold to begin investigations is important as it creates public confidence that an ICAC takes corruption seriously, and allows an ICAC to act as a deterrent for future corrupt conduct. For example, if a politician or a public official has little belief that an ICAC will actually begin an investigation into a matter that is not clearly criminal corruption, they will not be deterred from acting dishonestly or against public interest. To be successful in investigating and exposing corrupt conduct, an ACT Integrity Commission should have a low threshold to be able to begin investigations, and should have full discretion in this decision on whether to investigate.

Public hearings

The key role of an anti-corruption commission is to investigate and expose corruption. Public hearings are an important investigative tool, and an effective mode of exposing corruption. Our research has found that the regular conduct of public hearings has been critical to NSW ICACs success. As shown above, when comparing the success of anti-corruption commissions in Australia, NSW ICAC has held 28 public hearings over the past 4 years which has contributed to it out performing the other state commissions. Apart from Vic IBAC, that has held 4 public hearings over this time, no other commissions have held public hearings.

According to former and current state commissioners in NSW and Victoria, many investigations at a state level would not have been successful without members of the public coming forward with additional evidence at public hearings.⁸ Former assistant NSW ICAC Commissioner Anthony Whealy QC has said “there are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost.”⁹

An ICAC has two main tools available to it in order to expose corruption: public reporting and public hearings. Reports on investigations are usually tabled in Parliament at the end of an investigation when findings have been finalised. As well as leaving large discrepancy to the author of such report in what evidence to leave in and what to leave out, reports are tabled months or even years after an investigation has

⁸ <http://www.ibac.vic.gov.au/media-releases/article/ibac-shines-light-on-serious-corruption-in-its-third-year>, <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

⁹ <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

finished.¹⁰ They also require journalists and members of the public to sift through hundreds of pages of legal document, providing a barrier to full transparency.

In comparison, public hearings provide a transparent, timely and accessible form for an ICAC to expose corruption. They allow members of the public to hear for themselves the allegations and evidence, and see how ICAC investigations function. Despite reservations about public hearings based on 'reputational risk' from some academics, public hearings allow allegations to be heard and judged by all. If unfair allegations are indeed made, the public and media will see that the person in question is being treated unfairly. As the role of anti-corruption commissions is to investigate and expose corruption, and much of the content of investigations comes out in hearings, the act of hiding hearings from public view threatens the proper function of the commission. Former NSW ICAC Commissioner David Ipp QC has said that "Its main function is exposing corruption; this cannot be done without public hearings."¹¹

At a functional level, ICACs rightly have no power to prosecute based on their findings. The investigations lead to corrupt conduct findings that can be recommended for further action by the Director of Public Prosecutions if there is a strong case that criminal offences have been committed. As the public view of corruption, and corruption reflected in the anti-corruption legislation, is broader than the corruption as defined by the criminal code, the strength of the non-criminal corrupt conduct findings is mostly in the public exposure of these findings as a deterrent.

CONCLUSION

NSW ICAC has been by far the most effective anti-corruption commission in Australia. Differences in its design, particularly a broad jurisdiction and the regular conduct of public hearings have been critical to its success. The Australia Institute recommends that the ACT Integrity Commission adopts these design features to ensure its effectiveness.

¹⁰ See, for example, NSW ICAC 2016, Report - INVESTIGATION INTO NSW LIBERAL PARTY ELECTORAL FUNDING FOR THE 2011 STATE ELECTION CAMPAIGN AND OTHER MATTERS, <http://www.icac.nsw.gov.au/component/ investigations/article/5031?Itemid=4196>

¹¹ <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>