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29 September 2017

Ms Julia Knight
Secretary
Social Policy Scrutiny Committee
GPO Box 3721
DARWIN NT 0801

Via email SPSC@nt.gov.au

Dear Ms Knight

Re: Independent Commissioner Against Corruption Bill

The Crime and Corruption Commission (CCC) welcomes the invitation from the Chair of the Social Policy Scrutiny Committee (the Committee) to make this submission on the Independent Commissioner Against Corruption Bill 2017 (the Bill).

The CCC has a particular role to continuously improve the integrity of, and to reduce the incidence of corruption in, the public sector. The CCC and its predecessor, the Criminal Justice Commission, have over 25 years' experience in the investigation of public sector corruption. The CCC acknowledges that it does not have detailed understanding of the Northern Territory's existing legislative framework governing allegations of corruption. Despite this, the Committee's consideration of the Bill may derive some benefit from the CCC's knowledge and experience of the *Crime and Corruption Act 2001 (Qld)* [CC Act].

The independent ICAC

The Bill is to be commended in its drafting of a new anti-corruption watchdog for the Northern Territory to be called the Independent Commissioner against Corruption (ICAC). The CCC considers that independent, accountable and adequately resourced anti-corruption/integrity bodies are essential for investigating, deterring and preventing corruption and dishonesty in our public institutions. The Bill establishes an independent ICAC¹ with appropriate discretion and power² to perform these important functions in the public interest³ either itself or by referring improper conduct to public bodies and other entities to deal with subject to the oversight and direction of the ICAC.⁴

¹ ss. 17 and 21 of the Bill.

² ss. 8 – 19 and 31 of the Bill.

³ ss. 20 and Schedule 1 of the Bill.

⁴ ss. 22- 30 of the Bill. Public bodies and other entities may be required to report as directed by the ICAC.

Powers to be provided by other legislation

The Bill does not provide the ICAC with all the powers necessary for the effective investigation of improper conduct. Some powers are apparently intended to be provided by a separate Bill that will make consequential amendments to other legislation.⁵ It is not proposed to make any detailed comment on these powers and other legislation. There are advantages to sourcing particular powers from other legislation. However, with respect to the ICAC, this should be on the condition that appropriate separation is maintained for both the oversight and confidentiality of the ICAC's exercise of powers. This promotes independence and keeps the ICAC's powers aligned with best practice prescribed by the other legislation. The ICAC must be properly consulted before any amendment is made to the source legislation to ensure fitness for the purposes of the ICAC including its confidentiality and oversight regimes.

Cornerstones for the ICAC reporting regime

Part 1 Division 2 of the Bill details a series of important concepts which inform the meaning of 'improper conduct' that consequently underpin the broad scope of the ICAC's general functions and powers set out in Part 2.

Part 3 Division 1 of the Bill includes mandatory requirements for the reporting of suspected improper conduct to the ICAC. Two cornerstones of the reporting regime are the requirement for the ICAC to issue directions to public bodies and public officers⁶ and the related whistleblower protections provided under Part 6 of the Bill.

In this regard the Committee may wish to consider two separate matters.

No universal statutory right to make a protected complaint

First, unlike the Queensland CC Act, the Bill does not provide a statutory right for any person to make protected complaints of improper conduct directly to the ICAC or public bodies and public officers. This may be contrasted to the extensive protections against civil and criminal liability the Bill provides to persons acting in good faith in an official capacity.⁷ The CCC considers that a statutory right for any person to make protected complaints of corruption⁸ to public authorities is essential to promote public confidence in the CCC and for the exposure of corruption that may be investigated and dealt with under the CC Act. It is recommended that the Committee give consideration to whether or not similar rights and protections may be incorporated into the Bill to promote public confidence in the ICAC and the public sector.

Corporations law displacement

Secondly, the Bill does not provide any Corporations law displacement provision for the purposes of the *Corporations Act 2001 (Cth)*, s. 5G, in relation to s. 1317AE of that Act. By way of example I refer to clause 4 of the Guardianship and Administration and Other Legislation Amendment Bill 2017⁹ currently before the Queensland Parliament. This clause has been drafted to enable Queensland government owned corporations to lawfully comply with its obligations to report corruption to the CCC despite constraints imposed by s. 1317AE. The Bill's current definition of a 'public body' in s. 16(1)(f) and (h) plainly include corporations that may be subject to the Corporations law. The CCC considers a Corporations law displacement provision appropriately adapted for the Bill will promote public confidence in the ICAC.

⁵ Explanatory Statement, p 2 indicates that key powers will be provided by amending the *Surveillance Devices Act*, the *Police (Special Investigative and Other Powers) Act*, and the *Telecommunications (Interception) Northern Territory Act*.

⁶ Part 3 of the Bill.

⁷ S. 152 of the Bill.

⁸ Ss 36, 216(5), 216A and 343, CC Act.

⁹ <https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/GAOLAB2017>

Referral and monitoring

The ICAC has appropriate power to refer and monitor improper conduct matters to be dealt with by referral entities. The Bill ensures that the ICAC may conduct audits and reviews under Part 2, Division 3 with appropriate information gathering powers set out in Part 4 of the Bill. This is essential to promote public confidence. These powers may be used to promote the effectiveness of the ICAC in its timely monitoring of how referral entities deal with improper conduct matters referred to them under Part 3 Division 4.

Investigation powers, reports and findings

Part 3, Division 5 – 8 generally provides the ICAC with investigation and other related powers common to anti-corruption agencies in Australia¹⁰. Overall most matters do not require further comment. However, the Committee may be interested in one matter related to the conduct of investigations and hearings under Divisions 5 and 6 and three other matters related to reporting obligations under Division 7.

Divisions 5 & 6

Section 63(a) of the Bill protects ICAC investigations from certain injunctive actions that might prevent or delay the ICAC from commencing or conducting an investigation or public inquiry. This is an important protection to promote public confidence in the gathering information and evidence concerning improper conduct. However, this may not be sufficient to protect ICAC from judicial contempt proceedings arising from the use of ICAC powers where court proceedings are on foot.

Sections 80(2) and (3) of the Bill effectively preclude the ICAC from gathering information or evidence from a witness who is charged with an offence on the ground the evidence might tend to incriminate the witness in relation to the offence.

Sections 63 and 80 will likely prevent the ICAC from properly examining persons charged with offences for legitimate purposes concerning the improper conduct of others. In many cases this may be contrary to the public interest despite the fact that the ICAC would otherwise appear to be able to effectively prohibit evidence from being disclosed to investigators, prosecutors, witnesses and others involved in the court proceedings and also from being used, directly or derivatively, against the person charged or a witness in proceedings.¹¹

The CCC considers the appropriate balancing of individual rights and the public interest is better determined by having regard to the circumstances of each particular case in the light of available evidence. Section 331 of the CC Act provides a robust mechanism to allow CCC investigations to proceed and to examine any witness (including those charged with an offence) in closed investigation hearings. Indeed CCC investigations have benefitted substantially by the operation of s. 331 of the CC Act in managing closed hearings in ways that have had proper regard for the protection of individual rights and the public interest. This promotes public confidence and supports timely and effective investigations.

Division 7 and the time for procedural fairness

The following observations are not intended to apply to any investigation report which is to be tabled in the Legislative Assembly. The Committee may wish to consider the appropriateness of the timing of the s.49(2) requirement to give a person reasonable opportunity to respond to adverse material in investigation reports before the ICAC provides the report to a responsible authority for purposes implied by s.49(4)(a)(i). This mandatory requirement is imposed despite the fact that the report might never be made public or acted upon to the detriment of a person by means of prosecution or disciplinary

¹⁰ Subject to the earlier comment that the Bill does not contain all the powers needed for the effective investigation of improper conduct.

¹¹ Ss. 35, 46, 51(3)(a), 64 and Part 7 Division 5 of the Bill.

proceedings. In addition the timing of this procedural fairness requirement may compromise further appropriate action that might be taken by the responsible authority before completing its consideration of the report. For example the responsible authority may decide that further investigation or witness protection action may be necessary. The Committee may wish to consider whether reports could be treated in a similar way to the briefs of evidence given to law enforcement agencies or disciplinary authorities under s. 50.

Division 7 and material to accompany reports

The Bill does not include any express statement regarding the minimum standards for the disclosure of material to accompany a s. 49(2) investigation report or s. 50 brief of evidence. For example, under the CC Act, the relevant report or brief of evidence given to a decision-maker for consideration of prosecution or disciplinary proceedings must be accompanied by all relevant information known that supports the starting or defence of prosecution or disciplinary proceedings against any person which may result from the report.¹² An express provision of this kind promotes accountability and transparency for these decisions.

Division 7 and comments and findings made in non-public inquiry reports

The Bill does not include any expressly stated power for the ICAC to make general comments or findings other than in the context of a public inquiry¹³ and a public inquiry report¹⁴. While this may be implied from the context of the Bill it is in stark contrast to ICAC's express power to make findings in a public inquiry report in s. 51.

The Bill does not expressly empower ICAC to make comment or findings in regard to s. 49 investigation reports. It is acknowledged that s. 19 of the Bill empowers ICAC to do all things necessary or convenient to be done in relation to the performance of its functions. The CCC has a similar general power.¹⁵ It is also acknowledged that s. 55 of the Bill enables the ICAC to make recommendations and provide information to help others understand the purpose of the recommendations. The CCC similarly has a broad express power to make recommendations and, most importantly, comment on all matters of which it is aware that support, oppose or are otherwise relevant to its recommendations.¹⁶ The CCC considers this expressly stated power provides clarity for those who may seek to challenge the legal basis for such comments. This substantially limits the grounds upon which reports may be challenged to matters of fairness, independence and the public interest.

The Committee may wish to consider whether the s. 49 power might be appropriately adapted to include a broader express power to comment or make findings with respect to matters directly related to non-public inquiry reports.

Parliamentary privilege

The Bill is to be commended for including s. 82(1) limits to parliamentary privilege. Accordingly parliamentary privilege does not prevent allegations of improper conduct from being made against a member of the Legislative Assembly (MLA) and does not prevent the ICAC from investigating or making findings in relation to those allegations. However, s. 82(2) expressly states that s. 82(1) does not limit parliamentary privilege in relation to evidence that might be relevant to allegations, investigations or findings mentioned in that subsection.

The Part 6 Division 2 provides a comprehensive scheme for dealing with privilege claims, including claims of parliamentary privilege. The scheme may nonetheless prevent the ICAC from obtaining admissible evidence with respect to allegations of corrupt conduct by an MLA connected with the

¹² S. 49(4), *Crime and Corruption Act 2001*.

¹³ S. 43 (1) of the Bill.

¹⁴ S. 51 of the Bill.

¹⁵ S. 174, *Crime and Corruption Act 2001*.

¹⁶ S. 64(1), (2) and (4), *Crime and Corruption Act 2001*.

proceedings of the Legislative Assembly. The ICAC may refer these matters to the Speaker or the Deputy Speaker to deal with¹⁷. Of course this is inconsistent with the Bill's objects to improve public confidence that improper conduct will be detected and dealt with appropriately by the ICAC which is intended to investigate the most serious, systemic and sensitive improper conduct. That is undesirable.

The CCC is experienced in dealing with corruption allegations made against members of parliament in connection with parliamentary proceedings. The CCC operates under a similar regime to that proposed by the Bill. Neither regime is perfect as access to material evidence may be denied due to a valid claim of parliamentary privilege. Despite these imperfections, the CCC has overall been able to carry out effective investigations relying on other evidence and, when necessary, report to the parliament or to the Director of Public Prosecutions. Accordingly the ICAC should similarly be able to carry out effective investigations.

Conclusion

The CCC thanks the Committee for the opportunity to make this submission on the Bill.

Yours faithfully

A handwritten signature in black ink, appearing to read 'A. MacSporran', followed by a long horizontal line extending to the right.

A J MacSporran QC
Chairperson

¹⁷ S. 25 of the Bill.