



Speaker of the Legislative Assembly of the Northern Territory

Dear Madam Chair

I refer to the Social Policy Scrutiny Committee inquiry considering the *Independent Commissioner Against Corruption (ICAC) Bill*.

As Speaker I have taken an active interest in the development of this legislation because the proposed law has a direct impact upon the Members of the Assembly and the institution which serves all Territorians.

My interest comes not from a perspective of self-interest, but one of ensuring the integrity of the institution of parliament in perpetuity.

In order to ensure that the public and all Members of the Legislative Assembly are fully informed, I have sought the opinion of arguably Australia's pre-eminent legal expert on matters of parliamentary privilege, Mr Brett Walker SC.

In essence, Mr Walker's opinion (attached) is my submission without additional comment. I provide no further comment because I take the view the Committee is best served by considering this external and independent expert opinion on its own merits.

I have obtained the advice from Mr Walker for the sole purpose of assisting the Committee (and in turn the Assembly) in its consideration of the Bill and am happy for the Committee to seek any further advice directly from Mr Walker should it require any clarification.

I thank the Committee for the opportunity to make this submission and look forward to learning of its deliberations in due course.

Regards

Hon Kezia Purick MLA
Speaker

INDEPENDENT COMMISSIONER AGAINST CORRUPTION BILL 2017

OPINION

I am asked to advise the Speaker of the Legislative Assembly of the Northern Territory on the potential impact on the powers and privileges of the Legislative Assembly were this Bill to be enacted.

Clauses 10(3) and 11(3)

2 These proposed definitions of “corrupt conduct” and “misconduct” use the notion of a “breach of public trust”, which itself would be defined by the proposed sec 4 to mean “conduct by a ... public officer that is intentionally or recklessly inconsistent with the functions of the ... officer including the duty of the officer ... to act in the public interest”.

3 The status of Members of the Legislative Assembly as public officers for these purposes would be put beyond doubt by the proposed para 14(2)(b).

4 Thus, the proposed rôle for ICAC would include from time to time considering whether a Member’s conduct as such met those descriptions. Inevitably, such consideration would involve ICAC rendering and publishing its own judgement as to what the “public interest” requires in relation to the functions and duties of a Member.

5 The Legislative Assembly has the power granted by sec 12 of the *Northern Territory (Self-Government) Act 1978* (Cth) to declare its own non-legislative powers, privileges and immunities (including that of its Members), but not exceeding those of the House of Representatives. That power extends to “providing for the manner in which” those powers etc “may be exercised or upheld”.

6 This legislative power has been exercised, amongst other ways, by the enactment of sec 4 of the *Legislative Assembly (Powers and Privileges) Act* (NT). Relevantly, it renders those powers etc the equivalent to those “for the time being of the House of Representatives of the Commonwealth ... (etc)”. There are no provisions, as I read that Act, declared elsewhere in it that affect the present questions.

7 The House of Representatives, beyond any possibility of dispute, has the capacity to adjudge for itself the question whether one of its Members has conducted himself or herself in breach of the standards which, in the public interest, are required of a Member of the House of Representatives. This critical but uncontroversial proposition may briefly be established by reference to sec 49 of the *Commonwealth Constitution* and sec 5 of the *Parliamentary Privileges Act 1987* (Cth). Their combination requires reference to the powers etc of the House of Commons at Westminster as they existed on 1st January 1901 – with important exceptions such as the absence of a power to expel a Member, by reason of sec 8 of the *Parliamentary Privileges Act*.

8 Treatises could be, and have been, written on the late 19th Century position of the House of Commons' privileges. (I use that expression to embrace the compendious "powers, privileges and immunities".)

9 By way of illustration, sufficient for present purposes, Chapter III of *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* by Sir Thomas Erskine May in its 10th ed relevantly edited by Sir Reginald Palgrave (both of these learned gentlemen having held the office of Clerk of the House of Commons), published in 1893, demonstrates by numerous examples the exercise of jurisdiction by the House of Commons to discipline its own Members for contempt of Parliament. The existence, of course, of a contempt jurisdiction possessed by the House of Representatives was definitively confirmed by the High Court of Australia in *R v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, although in that case it was exercised against strangers.

10 It is an old question whether that jurisdiction was, as to the House of Commons, exclusive in the sense that the ordinary courts of law had no such jurisdiction, or indeed had no jurisdiction to entertain criminal proceedings for the same conduct that the House of Commons may regard as a contempt. A different if derivative question has been understood to arise concerning the jurisdiction of the House of Representatives. In short, at an abstract level the question of "[t]he precise jurisdiction of courts of law in matters of privilege, is one of the most difficult questions of constitutional law that has ever arisen. Upon this point the precedents of Parliament are contradictory, the opinions and decisions of judges have differed, and the most learned and experienced men of the present day are not agreed": *Erskine May's Parliamentary Practice* (10th ed) at 128.

12 But by far most, if not all, of these historical controversies have concerned matters peculiar to parliamentary proceedings, such as the privilege of publishing accounts of them. Alongside those presently immaterial disputes that flared from time to time over the last four centuries, was the long-established proposition (probably from the late 17th Century) that parliamentary privilege was not claimable “for any indictable offence”: *Erskine May's Parliamentary Practice* (10th ed) at 113.

13 It is therefore untenable, in my opinion, to assert that the ordinary criminal courts have no jurisdiction to try and sentence Members of Parliament for crimes committed as such, including by conduct which would also constitute a contempt of the House in question. I note that a similar question arose in the recently decided appeal to the Court of Criminal Appeal in the Supreme Court of New South Wales by Edward Moses Obeid, who was convicted on an indictment for a wilful breach of the duties attached to his public office as a Member of the Legislative Council (by way of paraphrase). The offence is, or is cognate with, one known in shorthand as a breach of public trust or misconduct in public office.

14 One of the main points of appeal was a contention on behalf of the prisoner that the Houses of Parliament had so-called exclusive cognisance of such an offence so as to deprive the Supreme Court of jurisdiction to hear the proceedings on the indictment. In an earlier iteration of a similar argument pre-trial, a contention to similar effect had been rejected in *Obeid v R* (2015) 91 NSWLR 226. A bench of five

unanimously decided on 13th September 2017 also to reject the contention as framed before it: [2017] NSWCCA 221¹.

15 The reasoning in *Obeid* was by no means novel. It suffices to note the discussion in it and its precursor of the approach taken in *R v Boston* (1923) 33 CLR 386, a case of bribery of a Member.

16 A Code of Conduct adopted by the Legislative Council was the object of argument in *Obeid*, including to the effect that it signified or supported the so-called intra-mural confinement of misconduct according to its terms to the jurisdiction of the Legislative Council, so as to exclude the jurisdiction of the ordinary criminal courts. In the event, including as a matter of what was and was not in evidence about the Code of Conduct, it was not decisive in the reasoning of the Court of Criminal Appeal. Furthermore, the reasons of Bathurst CJ on this point (agreed in by the other Members of the Court) provide no ground whatever to regard the existence of standards promulgated by a parliamentary chamber as inconsistent with the enforcement of standards of conduct against Members of Parliament by dint of ordinary criminal adjudication: [2017] NSWCCA 221 at [76]-[78].

17 *Obeid* also held against a bold argument for the prisoner that, in effect, his duties as a Member of the Legislative Council bound in conscience only, in the sense that they were not justiciable in a court of law: [2017] NSWCCA 221 at [63] - [73].

¹ By way of disclosure, I note that since that judgement I have been briefed to advise in that case. I do not regard this circumstance as having any material significance for the purposes of expressing this opinion.

18 It follows, in my opinion, that these provisions of the Bill clearly require the proposed ICAC to determine from time to time whether certain alleged conduct is inconsistent with the functions of a Member and thus also to determine from time to time whether such conduct is in the public interest. However, an element of those determinations will constitute a matter or matters of law, apart from the obvious matters of fact and evaluative assessment. Those matters of law will remain subject to ultimate supervision by the courts of law, in the ordinary way of judicial review.

19 Just as in a criminal court proceeding on an indictment, the jury rather than the judge will decide matters of fact and evaluative assessment in a case of misconduct in public office of a Member, so the assessment of the relevant aspect of “corrupt conduct” and “misconduct” by the proposed ICAC would be carried out by ICAC according to its own procedures. One obvious difference is that ICAC will not adjudicate criminal guilt, although it will pronounce an opinion concerning it that will undoubtedly inflict a great stigma.

20 The drafting of the Bill uses the notion of “breach of public trust” in provisions which are explicitly additional to other parts of the definition of “corrupt conduct” or “misconduct” that comprises conduct “that constitutes an offence ... connected to public affairs”: subcll 10(1) and 11(1). Everything advised above applies to those latter proposed provisions: they overtly require ICAC to apply standards of the criminal law to a Member against whom such conduct is alleged.

21 However, as illustrated by *Obeid*, a breach of public trust may be criminal, as well as constituting civil illegality which the civil courts of law are bound to consider in appropriate cases, as well as no doubt constituting conduct unbecoming a Member

or perhaps even a contempt of Parliament, as adjudged by the House. These multiple characters are not unknown to the law, public or private. They do not constitute any objection in principle, in my opinion, against ICAC being required to apply such standards in appropriate cases before it.

Clause 12

22 These proposed definitions of “unsatisfactory conduct” use the notions of “impropriety”, “negligence” and “incompetence” with respect to such conduct by a Member. The first of these may well overlap with criminal conduct, of the kind discussed above. The second and third of these may be found in cases of criminal misconduct, but obviously may not be sufficient in any particular case to amount to a crime. Accordingly, these proposed definitions do raise matters of evaluative assessment proposed to be carried out by ICAC, with respect to a Member against whom such conduct is alleged.

23 The proposed prescriptive definition of “incompetence” in subcl 12(2) involves a standard of reasonableness, reasonable expectation and excludes conduct “that is less than best practice” or about which, being “a matter of policy” there may be reasonable disagreement. These are matters far from the matters of law and criminal liability discussed above. Without belittling their importance in the public interest, they are obviously critical matters of opinion of a kind that the proposed ICAC could scarcely be regarded as especially expert to pronounce (however distinguished its own officers may be).

24 Unlike the case of a potential criminal adjudication, as discussed above, it is plausible to suppose that the House could express by resolution its sharp disagreement with an ICAC assessment of “negligence” or “incompetence”. That is virtually unimaginable in the case of crime, given the long tradition of Houses in the Westminster tradition refraining from canvassing the outcomes of court cases, except in the constitutional context of curative or responsive legislation. The so-called *sub judice* rule is another aspect of the same parliamentary restraint.

25 In general terms, in my opinion, it would be undesirable for such a conflict of view between the public institutions of the Legislative Assembly and the proposed ICAC to be rendered possible by such provisions.

26 I note that subcl 12(3) excludes judicial officers in the performance of judicial functions from falling within “unsatisfactory conduct” – notwithstanding the notorious reality of improper, negligent and incompetent judges, alas. That exclusion nonetheless is easily justifiable in political terms as one way to recognize the institutional integrity of the judiciary in its relations with the executive and executive agencies. Perhaps a similar caution should be emulated in relation to the position of Members in their conduct as such. After all, it could scarcely be supposed that ICAC will be as good a place to articulate and enforce such standards as the House itself, let alone would be a better place to do so.

Clause 14

27 The proposed definitions in subcl 14(2) would render a Member a “public officer”, along with other personages including Ministers and judicial officers. For the reasons explained above with respect to crime, that may not be inappropriate.

28 But the proposed definitions in subcl 14(1) of the entities comprising a “public body” are in a different position. The implications of the Legislative Assembly being a “public body” would be very considerable, with possibly invidious consequences akin to those noted above in relation to cl 12 of the Bill.

29 I doubt whether subcl 14(1) encompasses the Legislative Assembly, not least because the plain words necessary to do so should probably be express, and they do not exist. Furthermore, I see no words that imply by necessity the inclusion of the House in any of these definitional categories. The two candidates are paras 14(1)(f) and (l); respectively, a body established by statute for public purposes, and a body supported by government funds or performing a public function for the Territory etc. Neither of these seems apt, to me, to include the organ of the legislature that is the source or authority for statutory establishment of bodies, for the provision of government funds and for the imposition and supervision of public functions.

30 It follows that I do not think that the proposed sec 14 would itself apply to a Legislative Assembly. However, if I were wrong in this view, for the reasons explained above it would be an extraordinary abdication of appropriate self-governance for legislation to be enacted giving the supervision of fundamental standards of and in the Legislative Assembly to the proposed ICAC. For more

abundant caution, I advise that the Legislative Assembly be expressly excluded from the definition proposed by cl 14 of “public body”.

Clause 21

31 In short, these provisions explicitly expose Members to an “audit or review” of his or her “practices, policies or procedures”. They do so by the inclusion of Members within the definition of “public officer”.

32 Presumably within the same spirit of the special treatment of judicial officers noted in 26 above, these provisions would exclude a “court or judicial officer in relation to the performance of judicial functions”: subcl 21(2). It is difficult to appreciate why the same concern for institutional integrity should not be extended to the Legislative Assembly and its Members, in the same way as I have suggested in 26 above.

33 In my opinion, the overtly normative and precautionary or preventive function of an ICAC audit or review under cl 21 is a very substantial infringement of the autonomy and dignity of the House and its Members, who simply should not be told by an outside authority, constitutionally located in the executive administration (albeit independent), how to conduct their exercise of official function. The contrast is with the proper supremacy of criminal courts in relation to crime, as discussed above.

Part 5 Division 2

34 These proposed provisions must be read with the important provisions of the proposed Part 5 Div 1. These latter comprise, if I may say so, a nuanced scheme with respect to defined privileges, and their existence, content and regulation in the proposed ICAC. The provisions of proposed sec 80 are particularly important, by generally preserving, in subcl 80(1), “the privileges, immunities and powers of the Legislative Assembly”. This provision explicitly recognizes the possibility of express provision or necessary implication by other provisions in the Bill by which those privileges etc may be limited.

35 The most obvious of these is, of course, to permit the proposed ICAC to deal with an allegation that a Member has engaged or is engaging in “improper conduct”, a central concept which includes “corrupt conduct” and “misconduct” – aspects of which are discussed above. For present purposes, I note in summary that allegations of criminal misconduct by Members as such can reasonably be regarded as appropriate to be considered by the proposed ICAC, whereas conduct of Members as such calling for censure without being criminal can reasonably be regarded as inappropriate for consideration by the proposed ICAC rather than the Legislative Assembly itself.

36 Against that background, the proposed provisions of Part 5 Div 2 should be understood as machinery provisions. It follows from my approach explained above that it would be better, in my opinion, if they were not available at all in relation to allegations of non-criminal conduct against a Member, and were confined to

allegations of criminal conduct against a Member, and allegations against a person or persons not being a Member but involving parliamentary privilege.

37 Although subcl 82(d) refers to "... parliamentary privilege, as provided for in section 80", as noted in 34 above that proposed provision does not positively define those privileges etc, and a good thing too. That definition is appropriately accomplished in the manner noted in 5 and 6 above – subject, of course, to the carve out proposed by subcl 80(2).

38 From my experience with somewhat similar issues that have arisen in relation to Houses in other Australian jurisdictions, the primacy given by cl 84 to dealing with claims of parliamentary privilege pursuant to a memorandum of understanding between the Legislative Assembly and the proposed ICAC is sound policy. There is every reason to be optimistic that the careful negotiation of such an arrangement will give full weight to the desirable autonomy and dignity of the House, and appropriate recognition of the public interest in the proposed ICAC fulfilling its enacted functions.

39 However, subcl 84(2) contemplates the possibility that a matter that may involve parliamentary privilege cannot be resolved in accordance with such a memorandum, as well as the possibility that there is no such memorandum in effect. In such a case, by default so to speak, claims of parliamentary privilege are proposed to be dealt with in accordance with the procedures in cl 85. Significantly, those procedures could lead in turn to the Supreme Court hearing and determining a claim of parliamentary privilege, as proposed by cll 86 and 87.

40 It is understandable that institutional sensitivity may be felt in the Legislative Assembly about an enactment that so plainly gives the final word on parliamentary privilege to the judicial arm. After all, much scholarship and legal history revolves around the problematic assertion and allocation of power or jurisdiction in this regard.

41 Nonetheless, it is to be observed that these provisions require judicial determination only if a memorandum of understanding is deficient or non-existent, and then again only if ICAC's authorised officer does not in effect accept the claim of parliamentary privilege (see para 85(2)(a)). It is not unreasonable to regard this contingent operation of proposed secs 85-87 as a spur to productive work to achieve an appropriate memorandum of understanding, and in my experience this is very likely to be successful.

42 I also observe that claims of parliamentary privilege are very often (if not, with great respect, always correctly) determined by the courts of law. This is as it must be, given that parliamentary privilege extends to provide grounds in law for certain substantive and procedural immunities. The courts of law are the proper forum, constitutionally and politically, for adjudication as to the existence of such immunities. It is for these reasons, by way of illustration, that there has accumulated case-law concerning subsec 16(3) of the *Parliamentary Privileges Act 1987* (Cth). There is no real infringement of the privileges etc of Parliament by this ordinary operation of the rule of law.


44 It is worth noting that the provisions of sec 17 of the Commonwealth Act provides for the presiding officers to certify matters relevant to the application of parliamentary privilege, for the purposes of judicial proceedings in which that matter

may arise. In my opinion, that is a useful kind of provision. It appears to have been effectively replicated by sec 24 of the *Legislative Assembly (Powers and Privileges) Act* (NT).

45 It follows that, in my opinion, the proposed provisions of Part 5 Div 2 will not erode the Legislative Assembly's ability to protect material subject to parliamentary privilege, in any real or material way. Even if a memorandum of understanding does not cover the position, the Clerk has standing to advance all appropriate arguments to protect privileged material, and the Supreme Court is bound to determine that matter according to the law from time to time declaring those privileges etc (as to which see 5 and 6 above).

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26th September 2017



Bret Walker