Personal perspective of Tony Harris, former NSW Auditor-General, on the proposed independent integrity commission

Introduction

In March 2017, a committee of the ACT Legislative Assembly, chaired by Mr Rattenbury, published an issue paper on an ACT Integrity Commission. The paper aimed to identify the most "effective and efficient model" of such a body for the ACT. It did this by examining anti-corruption bodies existing in or mooted for Australian jurisdictions. That examination compared the features of these bodies against a model set out by Tim Prenzier and Nicholas Faulkner in a paper published in 2010 in the Australian Journal of Public Administration.

This paper examines the elements of the Prenzier/Faulkner model to determine whether it is comprehensive and otherwise suitable for the ACT. By doing this, the paper identifies those elements of an anti-corruption body that should be present in the agency to be established for the ACT.

The Lesson from the First Independent Commission Against Corruption

The first modern Australian anti-corruption body was established in NSW by the Greiner (Coalition) government. The ICAC gained some notoriety when it found that Premier Greiner had acted corruptly in what might be described as the Metherell affair: the appointment of a member of the legislative assembly to the NSW public service in order to allow a by-election expected to favour the government.

The finding of corruption was overturned by majority decision of the NSW Court of Appeal. That decision has been interpreted as a vindication for Mr Greiner. However, the finding in Greiner's favour was more technical than favourable: it was based on the absence of a code of conduct that the Court held was needed to guide the ICAC in determining what was corrupt conduct. The ICAC used standards that were based on morality, and the Court found it needed objective, legal standards.

For many years, the NSW Parliament declined to formulate the required code of conduct thus effectively preventing any anti-corruption findings against politicians unless they had acted illegally. This shows the importance of defining what is corruption. It is clear that the morality that voters expect of politicians and other public officers would not be subject to an ICAC unless there is a clear definition of corrupt behaviour.

The Prenzier/Faulkner Model

As set out in the paper issued by the ACT Legislative Assembly committee, the Prenzier/Faulkner model has eleven elements.

A model ICAC should:

be able to conduct inquiries on its own motion. That is there should be no need for a parliament or other body to grant permission before the body can start an

investigation into suspected corrupt behaviour;

be able to require witnesses to attend and answer questions. That is the body should be able to compel witnesses to attend hearings and to answer questions. (This also suggests that the answers by witnesses should not be able to be used as evidence against them in any criminal or civil court);

be able to hold its hearings in public. According to a number of politicians – in NSW if not other jurisdictions - this is a contentious power. The power is often described as one exercised by a 'kangaroo court'. However, this is an argument advanced by those who do not wish the public presentation of suspected corrupt activity. If the public is to have some confidence in the operations of an ICAC its hearings into important matters ought to be conducted in public. Secret hearings give no such confidence. And we should remember that it is a common feature of Australia's criminal system that a magistrate would hear and consider in public whether there is a sufficient case for a matter to be considered by a higher court. Lastly, it is a feature of Australia's judicial system that matters be considered in public unless there are persuasive reasons not to;

be able to apply for warrants to search properties and seize evidence. This is an unexceptionable and necessary power if an ICAC is to be effective;

be able to engage in covert activities. Again, this is a non-contentious and needed power;

directly investigate serious and intermediate matters. It is a common feature of anti-corruption bodies that they may refer matters to relevant agencies, for example, the agency where suspected corrupt activity is occurring or to the police. The stipulation that important matters be considered by the anti-corruption body and not be passed off is unarguable;

make disciplinary decisions and provide mediation. Clearly, an ICAC must be able to find that a person has acted corruptly or is corrupt. This element would go further by allowing the body to suspend or impose a penalty or dismiss a person who has been found to have acted corruptly. Alternatively, the body can mediate such penalties with the agency responsible for the person found to have acted corruptly. It is more common that an anti-corruption body allows another authority, such as the courts or an employer to determine the appropriate penalty or response when a person is found to be corrupt. Providing this power might be efficient in that the anti-corruption body deals with the whole matter. But the lack of division of power – as between judge, jury and executioner - might be questionable;

conduct research and risk reviews aimed at reducing corruption. This power allows an anti-corruption body the ability to use its skills and knowledge in a way and for a purpose that seems unexceptionable;

engage in public sector ethics training. This extension of the power discussed above is also unexceptionable.

prosecute complainants who are patently vexatious. This power seems excessive if it is understood that an anti-corruption body can ignore vexatious complainants. Other mechanisms – such as an employer's response to a vexatious complainant – ought to be sufficient;

account for its work. This is a necessary power and responsibility for all public agencies.

Most of the eleven elements outlined by Prenzier/Faulkner would be necessary for an effective anti-corruption body. However, there are others that should also be considered.

Adequate Resources

One of the responses available to a government that is in dispute with its anti-corruption body is to deprive the organisation of resources needed for the body's effective work. Arguably, the Carr government achieved this when it significantly reduced resources in real terms available to the ICAC. To avert this possibility, the legislative assembly as a whole, or one of its committees that is not dominated by government members, should have the legislated power to determine the appropriation that is directed to the anti-corruption body in the annual budget. There are in Australia a number of existing precedents for this element.

Competent Leadership

Another response by a government in dispute with its anti-corruption bodies is to appoint as the body's commissioner or president a person who is unlikely to demonstrate adequate initiative or drive. Again, it is arguable that the Carr government achieved this goal in some of its appointments. To avert this possibility, a relevant committee of the Legislative Assembly should appoint the senior officer of the anti-corruption body as an officer of the Legislative Assembly. There are in Australia a number of existing precedents for this element.

Corruption Properly Defined

A proper definition of corruption is the most important and for some the most difficult issue of those needing discussion. Unfortunately, the ACT Legislative Assembly issue paper gives little attention to the matter.

We expect that the definition of corruption, for the purposes of this anti-corruption body, would include matters that are unlawful. Thus bribery, fraud, theft, homicide, violence, embezzlement and so on are among the deeds defined for the purposes of the NSW ICAC Act 1988 as corrupt.

But to most or many voters, corruption has a wider compass.

For example, the ICAC Act defines official misconduct as corruption. This includes malfeasance (an act that is unjustified or harmful), misfeasance (abuse of power), nonfeasance (improper failure to act), oppression, extortion and imposition.

Finally, the NSW Act also defines acting with partiality as corrupt activity.

It is these additional inclusions that really address the notion of public corruption as understood by the public. The community expects that their public officials, elected or appointed, will act according to law. This is basic and fundamental. But it is insufficient. The community also wants public officials to act properly, in accordance with community values. And it is in this latter area that public officials are too often found wanting.

So, if a Minister or public officer makes decisions on the basis of the electorate of the requesting party rather than on the merits of the case, the community would hold that act to be corrupt. If an officer advances the case of donors in advance of non-donors to the government, the community would regard that act to be partial and corrupt.

Fraud or theft and other acts already seen as unlawful might be described as personal corruption because those acts benefit directly the person. And it is important that those acts be captured by a definition of corruption. But it is more important that acts of public corruption be captured. Public corruption is likely to be more corrosive of public trust and more inimical to the social contract between the governed and the governing. Public corruption is also more likely to be more harmful to the community.

Examples of public corruption would include acts where public officers instruct public servants on the advice they wish to receive. Thus a Minister who tells an official, "Change the recommendation to the one I want" is acting corruptly. A Minister who tells an official, "If you recommend "x" your contract will not be renewed", is acting corruptly. A Minister who asks an official to withdraw criminal charges against a person is acting corruptly. A minister who pressures the head of an agency to appoint or promote a particular person is acting corruptly.

These examples are advanced because they have occurred – albeit at the Commonwealth level – without any recourse against the relevant Ministers. And those Ministers' actions would not be subject to investigation by an anti-corruption body if the definition of corruption were inadequate.

Suspected Corruption Properly Notified

Lastly, there needs to be a provision that helps to ensure suspected corruption is brought to the attention of an ACT anti-corruption body. In particular, a requirement that suspected corruption be notified to the anti-corruption body would assist officials, especially those who believe their position or employment would be compromise by making a notification. Indeed, it would be beneficial if a decision not to make such a notification was defined as a corrupt.

Scope of Anti-corruption Commission

An issue that recently emerged in NSW concerned the scope of the state's anti-corruption legislation. The ICAC was prevented from investigating the behaviour – possible corrupt behaviour – of a Deputy Senior Crown Prosecutor, Ms Margaret Cunneen SC. There was a suggestion, one under investigation by the ICAC, that Ms Cunneen had provided advice to an associate that was designed to pervert the course of justice.

Ms Cunneen was not at the relevant time performing any public duty, and the case eventually settled by the High Court revolved around the question of the ICAC's authority to investigate a person whose actions affected the efficacy of police processes but not the probity of those processes. The NSW Parliament subsequently amended the ICAC Act retrospectively to ensure that private sector developers who had been found to have acted corruptly by affecting the efficacy of public processes could not successfully challenge those findings. These amendments did not capture Ms Cunneen's actions.

There appears to be merit in the view that ACT legislation should ensure that anyone – including persons not employed by a government body - who has acted to subvert the efficacy or probity of public processes may validly be subject to corruption investigations and findings.

Code of Conduct

The act establishing an ACT anticorruption body must make it clear that any code of conduct binding members of the Legislative Assembly augments and does not restrict the definition of corruption included in the Act.

Conclusion

The elements outlined by Prenzier/Faulkner for a model anti-corruption body include some issues that politicians find difficult. But the additional requirements set out in this paper are also likely to be seen by elected public officers as "difficult".

These added requirements appear to limit the capacity of politicians to act partially and thus restrict their ability to offer particular benefits to individuals or groups of individuals in order to secure electoral support. But if these elements wee not included in ACT legislation the resulting anti-corruption body

would be of little value. The community wants its public officials to act ethically and in the public interest. Too often these officials act in their own interests by promoting the interests of the influential few.

April 2017