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Ms Sophie Dunstone
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Senate Select Committee on a National Integrity Commission
Parliament House
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Dear Ms Dunstone

NSW Ombudsman answers to questions on notice

Thank you for sending an electronic copy of the proof *Hansard* transcript for the Committee's public hearing in Sydney on 12 May 2017. I took two questions on notice and provide the following answers.

Question 1 (p. 8 transcript)

Senator WATT: *Thank you. In the interests of time, if you would not mind, I might give you one that is effectively a question on notice. I think Senator Rhiannon dealt with this a little bit in her questioning, but I dropped off the line there at one point. There obviously have been a range of criticisms levelled at the New South Wales ICAC over the years about, allegedly, an organisation getting out of control, pursuing the wrong kinds of issues and those kinds of things. I would be interested in your views if you would like to come back to the committee on whether that is a fair criticism and, if so, what structural changes could be made to an integrity type body to avoid those sorts of problems occurring. It may be that some of those problems have been addressed through the recent legislative changes, but perhaps there could be a bit more. So, if you would not mind, could you just have a bit of a think about that and come back to us.*

Two issues that are prominent in the public debates about ICAC and other anti-corruption bodies are whether anti-corruption bodies should conduct investigative hearings in public or private, and whether the bodies should make findings of criminal guilt and referrals to the Director of Public Prosecutions (DPP) that are placed on the public record. Differing views have been expressed on those issues, including by independent reviews that have supported the practices adopted by ICAC.

I will offer two observations, from the perspective of the practices of the Ombudsman's office. Firstly, as to public/private hearings, transparency about investigative processes and

findings is important, but does not alone come through public hearings. There is always the option of announcing publicly that matters are being investigated, and holding some preliminary hearings in public (but examinations in private), and publishing the investigation report. The Ombudsman's office has always followed the practice of investigate in private and report in public. That is a statutory requirement, primarily to ensure that individuals' privacy and agencies' confidentiality are safeguarded while the investigation is being conducted and views are being formed.

Secondly, as to publicity of findings/referrals, the practice adopted by the NSW Ombudsman in a recent report (*Operation Prospect*) was to go no further in the final published report than to say that on the evidence before the Ombudsman the conduct of a named person 'may' constitute a specified offence. The report noted that some matters would be referred to the DPP, without identifying those matters. The explanation in part was that the evidence before the Ombudsman may not be admissible in criminal proceedings or may not be adequate to sustain a conviction and that it would therefore be unreasonable to provide any additional personal details in the public report.

Question 2 (p. 10 transcript)

Senator SMITH: *I will put some questions on notice around whether or not you think the gap is in the investigative function or the reporting function, and some questions about how you think the reporting functions and the level-of-awareness roles can be improved across existing agencies. But also, and perhaps more importantly, what is the difference between a national integrity commission and a national anticorruption commission? Of course, they are written differently! But does it mean that their structures and their internal processes are necessarily different if they have an anticorruption focus as opposed to an integrity-promoting focus?*

The first couple of questions raise similar issues to those addressed in my earlier response to the question on notice from Senator Watt. The criticisms that are made of investigatory agencies are often more about how their investigations are conducted, particularly if hearings are conducted in public.

On the other hand, a published report is a necessary outcome of a major investigation. To the extent that the report contains findings that damage a person's reputation or expose the person to further investigation or disciplinary or criminal proceedings, the analysis in the report will have to stand on its own merits. There is scope for anyone who disagrees with the findings and analysis in the report to question it directly, including in the public arena or through judicial review proceedings. Overall, that strikes the right balance.

As to the third question, the character of an integrity/anti-corruption commission will depend on how the particular commission is structured, and its functions, powers and procedures. To that extent, a particular commission could alternately be called an integrity commission or an anti-corruption commission.

The risk in calling it an anti-corruption commission is that the public focus is drawn to the role of the commission in exposing corruption by conducting corruption investigations, particularly if conducted in public. The other valuable work of the commission to prevent

corruption (eg, guidelines, training, awareness raising, complaint analysis and referral) can too easily be submerged by the public focus on celebrated corruption investigations.

My preference is to call a body an integrity commission. If so, a structure must then be adopted that reflects that title. For example, there should be discrete divisions that deal with corruption investigations/hearings, education/training, and intake analysis/referral. Each of those divisions should be headed by a senior officer (eg, Deputy Commissioner or Director) who has a public profile in explaining and representing the work of the division. Similarly, the Chief Commissioner must be publicly identified with all the work of the commission.

An added advantage in describing a body as an integrity commission is that it is more likely to develop effective working links with other oversight/integrity bodies, such as the Ombudsman, Auditor-General, Information Commissioner and Public Service Commissioner.

I appreciate the opportunity to provide the Committee with further information to inform its deliberations and look forward to reading the Committee's final report and recommendations.

Yours sincerely

Professor John McMillan
Acting NSW Ombudsman

1 June 2017