

Permanent Commissions of Inquiry and the Parliamentary Interface

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The Parliament and the Executive

The 1980s and 1990s saw many question the integrity of public sector administration. In three states (namely New South Wales, Western Australia and Queensland) public disquiet led to the establishment of permanent commissions of inquiry to investigate and expose corruption in the public sector. Because of the nature of corruption — secretive, consensual, and usually victimless — it was considered necessary to afford these commissions special coercive and investigative powers. Commonly these included powers to:

- obtain information, documents and other things from a public authority or official;
- enter public premises;
- require a public official to produce a statement of information or a document or other thing;
- hold hearings in public and private, without the rules of evidence applying;
- require a witness to answer any question, regardless of the possibility of self-incrimination;
- issue a warrant for arrest of a person failing to answer a summons, or likely to fail to answer a summons;
- obtain a warrant for a telecommunications intercept or listening device;
- conduct a controlled operation;
- use an assumed identity; and
- access tax records.

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With such extensive powers, accountability and review are essential, and parliaments have sought to maintain a role in overseeing permanent commissions.

Philosophically, the Parliament interface with permanent commissions of inquiry is based on the traditional conflict between the executive and legislature, permanent commissions being one of the most powerful executive branch tools. Disclosure and accountability to Parliament are central to the Westminster model of government. According to that tradition, the Parliament's role is to scrutinise and oversee the executive branch, providing a check on the arbitrary use of power.

When it comes to monitoring permanent commissions, the parliamentary committee system has proven to be the most practical means of providing this oversight. It is at this point that the parliamentary interface with standing commissions of inquiry occurs. Parliamentary oversight of a commission raises a number of issues.

- How does the Parliament's accountability role sit with the necessity of ensuring that the commission operates independently of political and partisan concerns?
- Does parliamentary oversight endanger the independence of the commission of inquiry?
- Is it even necessary for Parliament to have a role given the reality of party discipline and executive government?

In my view, a balance needs to be struck. A commission's extensive powers require rigorous accountability. At the same time, independence from political interference is crucial. The parliamentary interface, therefore, must balance accountability and independence.

Bearing this in mind, I will examine the areas of accountability, and discuss the appropriateness of a committee's participation in those oversight activities. While most of my comments will deal with the Independent Commission Against Corruption (ICAC), it being the agency with which I have had the most experience, the issues raised are pertinent for all the permanent commissions in Australia. I have incorporated comparative material where possible.

Monitoring and reviewing the ICAC's exercise of its functions

Under the *Independent Commission Against Corruption Act 1988*, the parliamentary committee's first identified function is 'to monitor and review the exercise of the ICAC's functions'. Similar functions are performed by the parliamentary committees on the National Crime Authority (NCA), the Queensland Criminal Justice Commission (CJC), the Western Australian Anti-Corruption Commission (ACC), and the Committee on the Police Integrity Commission (PIC) in New South Wales. What 'monitor and review' actually means is somewhat open to interpretation, but the ICAC committee has understood it as requiring the committee to examine:

- policies and procedures in place at the ICAC;

- the ICAC's use of its coercive powers; and
- performance measurement.

Examining the ICAC's policies and procedures

While the ICAC has the discretion to formulate and apply policies and procedures, it is appropriate for a committee of Parliament to examine them, and suggest changes where necessary. This is particularly the case where complaints have been made to the committee that highlight deficiencies in the ICAC's policies or procedures. The Commissioner retains the discretion as to whether to implement the recommended changes, as is proper in terms of the ICAC's independence.

The review of policies and procedures performed by the committee can actually be quite a far-reaching function. In the case of the ICAC committee, this has included examination of the ICAC's protected disclosure policy, its informant management policy, the application of privacy and personal information management principles, its procedures for acknowledging complaints, the procedures for advising witnesses of their rights, and media relations policies. The committee may also question the Commissioner on the ICAC's priorities and strategic direction.

The committee's role in examining such matters is not a threat to the ICAC's independence. It is exercised without compromising the ICAC's investigations, and it fits with the Parliament's traditional role of checking executive power.

In cases where the committee has concerns with the ICAC's performance, conduct or activities, there are few options available for it to bring about changes. In the interests of maintaining the ICAC's independence, the legislation ensures that the committee has only restricted powers of compulsion over the ICAC. Even the committee's statutory power to compel the production of documents or the answering of questions is limited in the case of the ICAC.

In circumstances of conflict or where the committee is dissatisfied with the ICAC activities, therefore, the committee's only course of action is to report the matter to Parliament. The reports tabled by the committee have identified several matters of concern and made recommendations accordingly.

A recent example related to the level of consultation undertaken by the ICAC in developing its recommendations for systemic change and corruption prevention measures. In considering the ICAC's second report on the investigation into parliamentary travel, the committee formed the view that there had been inadequate consultation by the ICAC in developing its recommendations. Indeed, some of the recommendations appear to reflect a lack of understanding on the part of the ICAC.

This led the committee to propose a formal consultation policy. The committee recommended that, as part of this policy, the ICAC be required to consult thoroughly with agencies in the course of developing systemic corruption

prevention recommendations, and that the ICAC should provide an explanation when departing from the policy. The ICAC partly accepted the criticism of its recommendations, although curiously it sought to argue, *ex post facto*, that its recommendations were merely drafts for discussion.

In Queensland, the review of procedures of the Parliamentary Criminal Justice Commission is carried further, and the CJC is obliged to comply with any guideline issued by the parliamentary committee, if that guideline has been supported by a bipartisan majority of the committee, and as long as the CJC has been consulted on the proposed guideline. I understand that this power has not yet been used by the committee.

Use of powers

I have already noted that there is a long list of coercive powers held by standing commissions, from telecommunications intercepts, to listening devices, to search warrants. To some extent a committee's — and thus the Parliament's — role in monitoring the use of the ICAC's coercive powers is limited. Owing to the sensitive nature of the information obtained in the course of using these powers, and the possibility of endangering an operation, the committee has only very restricted access to details about the use of these powers. Where access is granted, the committee must, if requested to do so, treat matters in confidence.

In practice, the ICAC committee merely obtains statistics on the use of each of the Commission's powers. While this does enable the Parliament to gain a broad picture of the use of various powers, and to make comparisons over time, it will not uncover any abuses of power should they occur. But given that one of the Parliament's roles is to provide a check on the abuse of executive powers, should the committee be empowered to monitor closely the Commission's use of coercive powers? Or would this impinge upon the Commission's independence, or increase the risk of disclosure of sensitive operational information?

The Committee on the ICAC has recently considered these questions as part of its review of the ICAC. The committee was concerned at the absence of a complaint mechanism for dealing with allegations of abuse of power at the ICAC. However, the committee determined that it would be inappropriate for it to undertake a role in investigating such complaints because the committee lacks the powers, qualifications, expertise and resources to do so in the way it believes they should be investigated.

The committee also noted the importance of ensuring that any agency dealing with complaints against the ICAC is completely independent of the Parliament, since members of Parliament fall within the ICAC's jurisdiction. Consequently, the committee recommended the establishment of an office of Inspector of the ICAC, with the role and function of investigating complaints about the Commission, including complaints of abuse of power.

An analogous although different approach has been taken in Queensland, where the Parliament (and the parliamentary committee in particular) play a pivotal role in the examination of alleged abuse of power by the CJC. Any complaints received by the committee about the Commissioner or officers of the Commission can be acted upon by the PCJC in a number of ways, including:

- directing the CJC to investigate the report;
- referring the matter to the Police Service or another law enforcement agency;
- requesting the Parliamentary Commissioner to investigate and report back; or
- any other action the committee considers appropriate.

Again, decisions concerning action on complaints must be made by a bi-partisan majority of the committee.

Performance measurement

Measurement of the ICAC's performance is a key accountability requirement. While it is important that the ICAC have ownership of the performance indicators that will be applied to it, it is also crucial that the indicators used, and the ICAC's assessment of its performance against those indicators, be independently verified where possible, and involve benchmarking.

The appropriate level of involvement of the committee in the performance measurement process has recently been considered by the committee. At the last general meeting with the Commissioner, the committee examined the ICAC's performance indicators and the means by which the ICAC's performance was assessed. The committee considered that the ICAC's key performance indicators were unsatisfactory, and required reviewing and amending. In many cases the ICAC's performance indicators were merely activity statistics, with no attempt to assess whether the activities were successful in furthering the ICAC's statutory objectives. For example, a list of investigation reports published in the preceding year failed to indicate whether the reports have addressed the corruption and corruption opportunities identified, nor whether similar agencies have taken measures to implement recommended corruption prevention initiatives.

Other performance measures focused on irrelevant matters. For instance, the ICAC measured the extent to which its services and products were sought in and beyond New South Wales. Moreover, activity statistics were provided as a means of measuring this inappropriate indicator. The committee expressed the view that the ICAC should consult with experts in the performance measurement field — such as the Audit Office — and has sought to participate in the process as an observer.

In addition to amending the performance measures, the committee sought a full investigation of the ICAC's performance, and recommended that an audit of the ICAC's performance be undertaken. It was not recommended, however, that the committee itself should conduct this review principally because such an audit would

require specialised skills and expertise, which it simply does not have. To overcome this, the committee recommended that the Auditor-General, as an Officer of the Parliament, conduct a special performance audit of the ICAC, while the committee proposed to engage a consultant to carry out an independent assessment and verification of the Commission's performance indicators and performance information on a regular basis.

A parliamentary role in reviewing performance indicators and assessing the ICAC's performance is appropriate. Since the Parliament supplies the funding for the ICAC, the Parliament is entitled to ensure that value for money results from the expenditure of those resources and to examine how the ICAC's statutory functions are being addressed. Moreover, the independence of the ICAC is not endangered by a process of providing its performance according to indicators endorsed by the committee.

Investigative decisions

A substantial proportion of letters to the committee on the ICAC relates to dissatisfaction with the ICAC's decision not to investigate a complaint. In fact, a survey of the committee's correspondence during the past five years revealed that requests for a redetermination of the ICAC's decision not to investigate a matter accounted more than 20 per cent of complaints.

What role should the Parliament play in overseeing a standing commission's decisions on investigations?

At the heart of the ICAC's independence is its ability to make investigative decisions without interference. The ICAC's impartiality must be beyond question if it is to retain any measure of public confidence. For this reason, it is inappropriate for a *Government* to direct the ICAC to undertake an investigation, or to order the ICAC to close down an investigation. The appropriateness of *the Parliament's* involvement in investigative decisions is less clear cut. Obviously, there should be no capacity for the Parliament to block or influence an investigation of a standing commission.

However, in NSW, there is provision for the ICAC to be required to undertake an investigation of a matter if it is referred by both Houses of Parliament. In an environment where the Government does not control the Legislative Council this, in effect, requires bi-partisan or multi-partisan support for a referral. In the only case of a parliamentary referral to the ICAC to date — the 1992 investigation into then Premier, Nick Greiner — multi-partisan support was obtained. Should a government control both Houses of Parliament, though, that government would be in a position to require the ICAC to undertake an investigation. It cannot, however, determine the outcome. Even without control of both Houses, it is always open to a Government to establish a special Commission of Inquiry. For example, the Royal Commission into the New South Wales Police Service was instigated following the failure of the ICAC to investigate corruption in the Police Service fully.

The Queensland jurisdiction allows, on a bi-partisan basis, for committee involvement in the Criminal Justice Commission's decisions to investigate. The Parliamentary Criminal Justice Committee may direct the CJC to undertake an investigation providing the motion is supported by a bi-partisan majority of the committee. It is unable to prevent the CJC from conducting an investigation.

Report, findings and recommendations

The ICAC Act empowers the ICAC committee to examine the ICAC's annual and other reports. Similar functions are conferred on oversight committees in other jurisdictions. The committee on the ICAC has closely examined each of the ICAC's investigation reports, and questioned the Commissioner about them in regular hearings.

The committee's focus is whether the report furthers the ICAC's statutory objectives, what powers it used and why, and the possible outcomes of the investigation and report. Specific matters recently considered by the committee on the ICAC have included whether the ICAC has collected admissible evidence as provided by the ICAC Act, how the investigations fit in with the ICAC's overall strategic direction, and the take up of the ICAC recommendations.

The committee made a number of criticisms flowing from the ICAC's report on the investigation into Manly Wharf, in which it was revealed that staff had defrauded Sydney Ferries of some \$200,000. In that case, the report identified insufficient admissible evidence to recommend laying charges against the individuals involved, but the Commissioner asked, in a media release, that the police consider obtaining admissible evidence with a view to laying charges. The committee expressed concern that any police investigation may have been prejudiced by the ICAC's public inquiry process, and further difficulties arose as a result of the flight of suspects. In addition, it was unclear to the committee why the ICAC, rather than the Police Service, undertook an investigation of fraud, until it was advised by the Commissioner that the Police Service had declined to investigate the matter. Arising from this case study, the committee recommended that ICAC investigation reports include information such as factors in the Commissioner's decision to investigate the particular matter, and an explanation of the ICAC's investigation including its use of powers.

In undertaking its role in examining reports, the committee is at all times aware that the ICAC Act prohibits the committee from reconsidering the findings, recommendations, determinations and other decisions of the ICAC in relation to a particular investigation or complaint. The committee does not function as an appeal mechanism for individuals dissatisfied with the ICAC's recommendations or findings.

This is not to say, however, that the Commission's findings and recommendations must remain unexamined. The effectiveness of the ICAC's recommendations, for example, and the rate at which they are implemented are justifiably subjects of consideration by the committee as part of its performance measurement activities. It

is legitimate for the committee to look at the impact of the ICAC's findings and recommendations. The ICAC itself does this to some extent through its follow-up reports, but the committee is interested in examining the impact on individuals of findings of corrupt conduct. This will be examined by the committee in a future report. Similarly, the ICAC's findings could be examined in the context of investigating the processes used in making a finding. The point is, the Parliament and the committee are entitled to *consider* the ICAC's findings and recommendations, but not to *reconsider* them.

Statutory reform — function and structures of the ICAC

Common to all the parliamentary oversight committees is the function of monitoring the effectiveness of the legislation that establishes the standing commission.

This is a continuing role, which requires the committee to determine whether the Commission is operating as intended by the Parliament when it passed the legislation, and to recommend changes to the statute where warranted.

At present, the committee on the ICAC is examining the definition of corrupt conduct and the Commission's investigatory jurisdiction under the ICAC Act. This involves obtaining submissions from interested parties about the strengths and weaknesses of the existing statute, and identifying possible amendments.

Access to information held by the ICAC

One matter that has repeatedly become an issue for the committee on the ICAC, and for committees overseeing commissions in other jurisdictions, is access to information held by the ICAC. Problems arise because of the conflict between the transparency required for proper accountability, and the confidentiality necessary to ensure the integrity of the investigative process.

In New South Wales, the conundrum is consolidated by statute. While the committee is empowered to call for papers, documents and 'things', there is no penalty for failure to produce, making the requirement unenforceable. Under the *Parliamentary Evidence Act*, a witness before the committee can be required to answer any lawful question. However, in the case of the ICAC, this is limited because, pursuant to the ICAC Act, the Commissioner (and Commission staff) are prohibited from releasing any information obtained in the course of fulfilling their functions, unless it is in the public interest to do so. It is the Commissioner who, in this respect, determines the public interest.

For the committee — and the Parliament more generally — this should be a case of concern. If the overseeing structure does not enable *someone* — an individual or agency — to have access to all of the Commission's information holdings, it is difficult to see how any level of accountability can be assured.

The committee of the ICAC has in the past been involved in minor battles with the Commissioner about access to particular items of information. One clash that made the news in New South Wales probably illustrates the issue well. The conflict related to the committee's attempts to examine the ICAC's holdings on the late Justice David Yeldham, about whom allegations of impropriety were made at the Wood Royal Commission and to the ICAC. The committee was concerned to discover if any impropriety was involved in the ICAC's decision not to investigate complaints it had received about Justice Yeldham. A request was made of the Commissioner that the files relating to Justice Yeldham be made available to the committee, if necessary on a confidential basis. The request was denied, with the Commissioner exercising his statutory power of determining what Commission information it is in the public interest to release.

A drawn out public row took place before the committee accepted legal advice that it lacked the power to compel the Commissioner to supply the information to the committee, and that it lacked the jurisdiction to examine the propriety of any particular investigative decision. Interestingly, there may have been a different outcome had the committee sought the file in order to study a matter of general policy or procedure, such as an examination of the treatment of all complaints against judicial officers.

The problem of access to operational material is common to all the overseeing committees. There are a couple of models available that have sought to overcome the problem. In Queensland, the Parliament has sought to maintain its primary accountability role in relation to the CJC, and has appointed a Parliamentary Commissioner who acts upon reference from the parliamentary committee to confirm that information that the CJC has deemed too confidential for the committee to have access to, is, indeed, highly sensitive.

In the case of the Police Integrity Commission, the New South Wales Parliament has opted instead to retain the restrictions on the committee's ability to access Commission holdings. An independent Inspector was established, who is entitled to unrestricted access to Commission files.

In the course of its Review of the ICAC's accountability, the committee considered the matter of access to the ICAC's files. The committee finally determined that the current restrictions were appropriate but only if an independent accountability body were established which did have access to all information held by the ICAC. The committee therefore recommended the establishment of an Inspector of the ICAC, as I previously mentioned.

I note for comparative purposes that other parliamentary overseeing committees also face restrictions on their access to information held by their standing commissions. In the case of the committee on ASIO, for example, the Minister may, for reasons of security, determine that a person should not give evidence or produce documents to the committee, and may issue a certificate to the Chair of the committee.

The appointment process

The final aspect to comment on is the Parliament's role in the appointment of commissioners. The executive branch usually is responsible for the appointment of statutory officers. In the case of permanent commissions in New South Wales, however, a parliamentary role has been incorporated into the appointment process. All proposed appointments to the positions of commissioners of the ICAC and Commissioner of the Police Integrity Commission must first be brought to the attention of the relevant overseeing committee, which is given the opportunity to veto the appointment. However, with a government majority on the committee, it is difficult to see the value of this process of the legislature providing a check on the exercise of executive power.

Conclusions

I would like to finish by looking at what conclusions can be drawn from this examination of the boundaries of parliamentary interaction with standing commissions of inquiry. The functions and powers of parliamentary committees are unsuited to providing full oversight of a standing commission of inquiry. Scrutiny of a standing commission is needed to expose any inefficiency, ineffectiveness, illegality, impropriety or abuse of power. The Parliament and its committees are unable effectively to meet such broad accountability requirements.

Oversight of a general nature — examining the Commission's performance, policies, and procedures, and the effectiveness of the enabling legislation — can be, and are, satisfactorily performed by parliamentary committees. However, the Commission's powers exceed those of the Parliament and its committees, and the Parliament is at a disadvantage in seeking to oversee the use of those powers, particularly given the impracticality of the committee's access to sensitive operational information. Moreover, such policing functions are not traditionally part of the parliamentary role, and would be more effectively performed by skilled investigators or judicial officers.

The Parliament and the parliamentary committees do not provide a practical structure for an efficient, effective and detailed oversight of the specific nature required for a permanent commission of inquiry with vast covert and coercive powers. Overseeing the functioning of a permanent commission is, I think, more appropriately performed by an independent person or agency, with powers and functions commensurate to the role. This would leave the Parliament's interaction restricted to matters more properly within the bailiwick of the Parliament — such as statutory reform, general oversight, and performance issues. ▲