

# Principles for designing a National Integrity Commission

*A briefing paper prepared in November 2017 by the  
National Integrity Committee*

## BACKGROUND

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A National Integrity Commission is urgently needed to investigate and expose corruption and misconduct in federal government and the public sector.

There are significant gaps in the jurisdiction and investigative powers of the existing federal agencies responsible for scrutinising the public sector and government. No federal agency has the power to investigate corrupt conduct as defined by our state based commissions. No federal agency can investigate misconduct of MPs, ministers, political staff or the judiciary.<sup>1</sup> The federal agencies that do have strong investigative powers, such as the federal police, can use them only when investigating criminal charges. No federal agency has the ability to hold regular public hearings, meaning that corruption and misconduct is not properly exposed to the public. Many cases of corruption reach across state borders, but state anti-corruption bodies are forced to abandon investigations once they reach the federal sphere. Consequently there is a need for an overarching body with umbrella type functions for the supervision of corruption and integrity in every area of federal public administration.

There is a growing public distrust of federal government with a recent poll finding 85% of Australians believe there is corruption in federal politics. In addition, there is overwhelming public support for a National Integrity Commission, with a recent poll

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<sup>1</sup> Advice should be taken as to whether an investigation of this kind of all or some Commonwealth judicial officers is constitutional.

finding over 80% of respondents support the establishment of a commission, and 78% of respondents supportive of a commission that holds public hearings.<sup>2</sup>

The design of a National Integrity Commission is critical. That design must incorporate features which ensure that the commission increases public trust in government. It must therefore be such as to allow corruption and misconduct to be properly investigated and exposed without improperly and unfairly prejudicing the innocent. This briefing paper was prepared by the *National Integrity Committee* to establish design principles for a national integrity commission that will ensure it is given the strength and tools to effectively do its job effectively and fairly.

## NATIONAL INTEGRITY COMMITTEE

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The *National Integrity Committee* was established by the Australia Institute to advise on the design of specific accountability reforms, including the establishment of a National Integrity Commission. The members of the committee are Margaret McMurdo AC, David Ipp AO QC, Stephen Charles AO QC, David Harper AM QC, Paul Stein AM QC and Anthony Whealy QC.

## PRINCIPLES AND RATIONALE

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- 1. That the Commission is an independent statutory body that is provided with the required resourcing to enable it to promote integrity and accountability and to enable it to prevent, investigate and expose corruption.*

Rationale: establishing the National Integrity Commission as a statutory body ensures the Commission is a permanent body protected from political intervention and unjustified budgetary constraints imposed to lessen its effectiveness. It must be independent from existing federal agencies as these agencies do not have the overarching jurisdiction, investigative powers, or breadth of profile to effectively investigate and expose corruption.

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<sup>2</sup> The Australia Institute (2017), *National poll – support for federal ICAC*, May 2017, <http://www.tai.org.au/content/support-federal-icac-poll>

A National Integrity Commission must be given sufficient resources to fulfil its purpose.

NSW ICAC has faced funding cuts over consecutive years, resulting in the loss of 17 staff including an entire investigative team. This occurred after ICAC exposed corruption in political donations involving ten members of the Liberal Party. The NSW Public Service Association has said that the funding cuts are an attempt by the NSW Government to diminish scrutiny.<sup>3</sup> Former NSW DPP Nicholas Cowdery AM QC has raised concerns about the resources made available to NSW ICAC and a future federal anti-corruption commission:

NSW ICAC has been faced this year with a funding cut. It is an easy way for government to impair the effectiveness of such a body and steps would need to be taken to ensure that adequate resources continued to be allocated to a national integrity commission.<sup>4</sup>

- 2. That the Commission has a broad jurisdiction, including the ability to investigate any conduct of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration, if the Commissioner deems the conduct to be serious or systemic.*

Rationale: There are significant gaps in the jurisdiction of existing federal accountability agencies. Parliamentarians, Ministers, parliamentary staff, and at least half of the public sector are not currently covered by effective accountability measures. In addition, currently no federal agency can investigate conduct of third parties attempting to improperly and unfairly influence public administration. The Independent Review of the Jurisdiction of NSW ICAC by the Hon Murray Gleeson AC and Bruce McClintock SC found that:

Certain kinds of fraudulent conduct, not necessarily involving any actual or potential wrongdoing by a public official, should be treated as corrupt conduct where they impair or could impair confidence in public administration.<sup>5</sup>

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<sup>3</sup> Knaus (2017), *ICAC weakening due to budget cuts and job losses, union and NSW Labor warn*, The Guardian, 17<sup>th</sup> July 2017, <https://www.theguardian.com/australia-news/2017/jul/17/icac-weakening-due-to-budget-cuts-and-job-losses-union-and-nsw-labor-warn>

<sup>4</sup> Cowdery (2017), *Lessons from NSW ICAC*, Conference Paper: Accountability and the Law 2017 Conference, <http://tai.org.au/content/lessons-nsw-icac-watchdog-has-teeth>

<sup>5</sup> Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC*

3. *That the Commission be granted the investigative powers of a Royal Commission to undertake its work, to be executed at the discretion of the Commissioner.*

Rationale: Corruption and misconduct are complex forms of wrongdoing. Corruption and misconduct are often committed by highly skilled professionals in positions of power within a system that is both well-known to them and difficult for others to penetrate. Corruption often occurs in networks of mutually beneficial relationships of powerful and influential people.<sup>6</sup> The corrupt often know how to hide their trail and stay in front. As outlined by former Premier Nick Greiner in his second reading of the *NSW Independent Commission Against Corruption Bill* in 1988:

“... corruption is by its nature secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim willing to complain. If the commission is to be effective, it obviously needs to be able to use the coercive powers of a Royal commission.”<sup>7</sup>

For this reason, a National Integrity Commission must be given the investigative powers of a Royal Commission. State based anti-corruption commissions, including NSW ICAC and Queensland CCC, have strong investigate powers including the ability to hold public hearings, compel evidence and witnesses, and use surveillance devices. To ensure these powers are not used irresponsibly, oversight of the Commission can be implemented through a parliamentary committee and an inspector as used in state based commissions around Australia.<sup>8</sup>

The necessary investigative powers include:<sup>9</sup>

- Coercive powers to compel the production of documents, other evidence and the examination of witnesses
- Ability to enter and search premises and inspect and copy documents
- Ability to use surveillance devices and phone intercepts
- Own motion powers to begin investigations at the discretion of the commissioner
- The absence of legal professional privilege, except in instances involving privileged communication between an Australian lawyer and a person for

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<sup>6</sup> Murray (2017), *Game of Mates: how favours bleed the nation*, self-published

<sup>7</sup> Greiner (1988), NSW Parliamentary Hansard, 26<sup>th</sup> May 1988

<sup>8</sup> See *NSW Independent Commission Against Corruption Act 1988* and *Queensland Crime and Corruption Act 2001*

<sup>9</sup> Prenzler (2010), *Towards a model public sector integrity agency*, *The Australian Journal of Public Administration*, vol. 69, no. 3, pp. 251–262

the purpose of providing legal advice in relation to the appearance of a person at a hearing before the Commission

- The ability to open hearings to the public
- The power to immunise witnesses on terms
- Protection to witnesses that anything said or disclosed may not be used against them in criminal proceedings

These powers must be available to be used in an investigation at the discretion of the Chief Commissioner, without any trigger or threshold. The Victorian IBAC has strong investigative powers but is only able to use them once a threshold of evidence has been met and the Commission is 'reasonably satisfied that the conduct is serious corrupt conduct'.<sup>10</sup> This threshold, if applied in NSW, would have not allowed NSW ICAC to investigate the Obeid family. Operations Jasper and Acacia, which led to Eddie Obeid being jailed for misconduct in public office, began with an anonymous phone call to NSW ICAC suggesting that they should look into coal licences in the Bylong Valley.

*4. That the Commission may hold a public inquiry providing it is satisfied that opening the inquiry to the public will make the investigation to which the inquiry relates more effective, and would be in the public interest.*<sup>11</sup>

Rationale: A National Integrity Commission will not be fully effective in exposing or investigating corruption unless it has the ability to hold public inquiries. An important factor to take into account when deciding to open the hearing, is whether the public interest in opening the hearing outweighs the potential damage to a person's reputation. Evidence from Australian state based anti-corruption commissions show that the ability to hold public inquiries has been critical to their success. Public inquiries are an important investigative tool, prompting members of the public to come forward with information that they may not have had the confidence or context to do without a public inquiry. They are also critical to exposing corruption and misconduct to the public, demonstrating publicly that corruption in public

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<sup>10</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s.60(2)

<sup>11</sup> Note: this Principle is the majority position of the committee, though a minority view is 'That the Commission may hold a public inquiry providing it considers on reasonable grounds that opening the inquiry to the public will make the investigation to which the inquiry relates more effective and would not cause unreasonable damage to a person's reputation, or be contrary to the public interest.'

administration is taken seriously by government and that investigations are carried out fairly by the commission.

In the 2015 report on the review of the jurisdiction of NSW ICAC, Murray Gleeson and Bruce McClintock observed that although public inquiries carry a risk of reputational damage and unfairness, publicity itself is a protection against administrative excess.<sup>12</sup> The report also noted that the Chief Commissioner is the best person to make the decision as to whether to open the inquiry, and that this process has led to predominantly good decisions:

The decision whether to conduct a public inquiry is an operational decision made for the purposes of the particular investigation. It is a decision best made by the Commissioner who is apprised of all the relevant facts and in the best position to weigh the public interest. There has, in fact, been little criticism brought to the Panel's attention (with one exception) of the ICAC's decisions to hold public inquiries, as distinct from the manner in which such inquiries are conducted. The exception is, of course, the decision to hold the public inquiry in [in the matter of Margaret Mary] Cunneen. That is an insufficient basis to recommend a change.<sup>13</sup>

Anti-corruption commissioners across Australia have recognised the power of public hearings. SA ICAC Commissioner Bruce Lander, who is currently the only Commissioner not able to open hearings, has made a recommendation to the SA State Government to allow the commission to hold public hearings to ensure transparency.<sup>14</sup> Victorian IBAC Commissioner Stephen O'Bryan QC has said that openly examining cases of alleged serious corruption and misconduct in public hearings has encouraged and empowered people to come forward and report suspected wrongdoing.<sup>15</sup> Former NSW ICAC Assistant Commissioner Anthony Whealy QC has said "there are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of

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<sup>12</sup> Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC* pp 62

<sup>13</sup> Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC* pp 60-61

<sup>14</sup> MacLennan, 2016, *ICAC Commissioner Bruce Lander pushes for public hearings to ensure transparency*, ABC, 31<sup>st</sup> October 2016, <http://www.abc.net.au/news/2016-10-31/icac-commissioner-bruce-lander-wants-public-hearings-in-sa/7980960>

<sup>15</sup> IBAC, 2016, *IBAC sheds light on serious corruption in its third year*, Media release, 14<sup>th</sup> September 2016, <http://www.ibac.vic.gov.au/media-releases/article/ibac-shines-light-on-serious-corruption-in-its-third-year>

it and the valuable information they have will be lost."<sup>16</sup> Former NSW ICAC Commissioner David Ipp AO QC has said that "Its main function is exposing corruption; this cannot be done without public hearings."<sup>17</sup>

Sir Anthony Mason, former Chief Justice of Australia, when discussing a possible restraint on the public hearings of a Royal Commission said:

However, this restraint, limited though it is, seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy; denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive. ....

The denial of public proceedings immediately brings in its train other detriments. Potential witnesses ..., lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.

... Here the ultimate worth of the Royal Commission is bound up with the publicity that the proceedings attract and the public has a substantial and legitimate interest in knowing what is happening before the Commissioner.<sup>18</sup>

- 5. That the Commission be governed by one Chief Commissioner and two Deputy Commissioners, appointed by the Minister on recommendations from a bipartisan Parliamentary committee. The Chief Commissioner is to be appointed for fixed non-renewable 5 year terms, and must be a judge or a retired judge or be qualified for appointment as a judge.*

Rationale: the appointment of one Chief Commissioner ensures efficient and fast decision making, functional staff management, and a direct line of responsibility

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<sup>16</sup> Gerathy, 2016, *ICAC inspector calls for end to public hearings to stop 'trashing of reputations'*, ABC, 12<sup>th</sup> May 2016, <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

<sup>17</sup> Gerathy, 2016, *ICAC inspector calls for end to public hearings to stop 'trashing of reputations'*, ABC, 12<sup>th</sup> May 2016, <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

<sup>18</sup> In *Victoria v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 97.

whereby the Chief Commissioner is held accountable for the proper functioning of the Commission. Appointing Deputy Commissioners is critical to ensuring that the commission has sufficient capacity to undertake its work. Appointment by the Minister on recommendations from a bipartisan committee and for a fixed term ensures political independence and freedom from fear of political retaliation.

*6. That the Commission be empowered to make findings of fact, to be referred to a well-resourced and specialised unit within the DPP for consideration for prosecution.<sup>19</sup>*

By their very nature, anti-corruption bodies are not judicial and do not exercise judicial power. Similarly to a Royal Commission, the bodies are usually empowered to receive information; to make findings; to report those findings; and to make recommendations to other agencies, including prosecuting authorities, in respect of further action to be taken arising from the information and findings.

There is a risk that corruption cases are not pursued with sufficient staff, knowledge or skills once referrals are made to the Director of Public Prosecutions (DPP). Corruption cases are often complex and unique, and may not be prioritised in a resource scarce department. For this reason, it is recommended that a well-resourced and specialised unit within the DPP is established to pursue these cases.

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<sup>19</sup> Note: this Principle is the majority position of the committee, though a minority view is ‘That the Commission be empowered to make findings of corrupt conduct, to be included in investigation reports and referred to a well-resourced and specialised unit within the DPP for consideration for prosecution.’ The Hon David Ipp AO QC notes that the ability to make corrupt conduct findings are critical to the commission’s role in exposing corruption to the public, as without the power to make corrupt conduct findings the outcomes of investigations can become lost in long lists of specific facts that will confuse the public and may or may not be pursued by the DPP. The dishonest implications of the specific facts found may also be confused, and the public is left not knowing if the government representative or public servant in question is corrupt or not.