Alex McKean - Ten reasons why a federal ICAC should have the discretion to conduct public hearings:

Associate Professor Appleby has argued that a federal ICAC should have the discretion to conduct public hearings in 'cases where public concern surrounding an allegation of corruption that it rises to a crisis of confidence in government', demanding an immediate assurance that a robust investigation is underway.

Recent survey research indicates that there is already something of a crisis of public confidence in government in this country. The Scanlon Foundation survey data shows that the percentage of people who thought the government in Canberra could be trusted to do the right thing by the Australian people dropped from 47% to 27% over the period from 2009 to 2013.

Corruption is seen as an increasing problem in Australia. The TI 2017 *Global Corruption Barometer* survey results found that majorities in the range 60-83 percent believed that there was at least some corruption amongst elected and appointed officials; 34 percent believed that corruption had increased, while only 5 percent believed it had decreased; 66 percent thought that corporate political donations were 'a big problem'; and 41 percent thought 'the government' was not doing well in 'handling the fight against corruption'.

I argue that the best response to this crisis in confidence is for a federal ICAC to be introduced which has a broad discretion to conduct public hearings, resulting in the being properly informed about the efficacy of the ICAC and investigations into corruption.

1. The first of these reasons is the most important, and in my view approaches the status of a paramount consideration. The public has the right to know, as electors in our system of representative democracy. The Commonwealth Constitution reposes ultimate sovereignty in the people as electors. When they come to exercise the franchise, they need to be properly informed. There are few things

which would be of more vital interest to an elector than whether corruption has occurred and what the response to it has been.

An analogy can be usefully drawn between the manner in which primacy has been given to the principle of open and accountable government in the tranche of reforms in to the Commonwealth FOI legislation 2010.

These reforms included the introduction of a set of factors specifically stated to be irrelevant to the determination of the public interest, including that access to the document could result in: embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government, any person misinterpreting or misunderstanding the document, that access could result in confusion or unnecessary debate, or that the author of the document was (or is) of high seniority in an agency.[1]

It can be argued that the 2010 reforms to FOI legislation expressly promoted the public interest in access to government information over the prospect that embarrassment or a loss of confidence would be caused by that access. The paramountcy afforded public access to government information is explicitly connected to the ability of citizens to meaningfully participate in representative democracy.

This paramountcy is also connected to the informing of debate about matters of public importance and effective oversight of public expenditure. Issues of possible official or political corruption can easily be characterised as matters of public importance and can clearly be found to arise from circumstances involving the effectiveness, or otherwise, of oversight of public expenditure.

[1] Section 11B(4) *Freedom of Information Act* 1982 (Cth).

2. Public support for a federal ICAC will be increased, if the public can se that the ICAC is exercising its powers responsibly and using public hearings sensibly. Public support is vital for the continued existence of an ICAC. An example is the acceptance of all recommendations of the Fitzgerald Inquiry by each of the major parties before it was known what they would be. Without a Constitutional basis public support is the best protection an ICAC can have against legislative or operational interference by a later government.

3. The public must see that corruption is being taken seriously and being dealt with properly, being fearlessly investigated and rooted out to prevent further loss of confidence of public in integrity of government.

4. The previous 3 points are more crucial in the federal sphere because the stakes are higher there and the public therefore more vitally interested in allegations of corruption being dealt with properly.

5. ICAC's are as a species similar to Royal Commissions, where proceedings are usually in public, one rationale being that if the matter is serious enough to require an RC, it is something where the public must be able to see the problem is dealt with transparently and thoroughly. I argue that work of ICAC is of the same gravity and requires the same response.

   The classic statement of these concerns was enunciated by Justice Mason in the *BLF Case*, where His Honour said an order that a commission proceed in private,

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

> The denial of public proceedings immediately brings in its train other detriment. Potential witnesses and others having relevant documents and information in their possession, 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.

6. Potential witnesses may come forward if proceedings happen in public

7. The argument that damage to reputation is irreversible is flawed. We trust the public to understand the use of the word 'alleged' in criminal proceedings. Is there then something special about public officials that they should not be treated similarly. Sir Richard Scott argues to the contrary, saying: 'In an inquiry involving questions of propriety of public officials – the public is entitled to expect that such an Inquiry will, where practicable and unless some overriding and counter-veiling public interest requires the contrary, be conducted in public.'[2]

8. A federal ICAC should have a preventative function and public hearings are important in discharging this, public officials can see the consequences of corruption, the public are empowered to report corruption because it is treated seriously

9. Public hearings can be venues for exonerating evidence to be led in the public eye

[2] Scott, R 'Procedures at Inquiries – The duty to be fair' (1995) 111LQR 596

10. These principles are aimed at protecting the health of our democratic system of government and the public confidence in it.