

Feedback on the Consultation Paper – A Commonwealth Integrity Commission – proposed reform

This submission is made on behalf of the National Integrity Committee. We are an independent group of retired judges who have been involved over the last 18 months in advocating the need for a Federal Integrity Commission. The Committee was formed with the assistance of The Australia Institute. However, we remain an entirely independent body acting in the public interest on a pro bono basis. Our representations have been made on a bipartisan level to the Coalition, the ALP and latterly to the Crossbench.

Much of our advocacy has been directed to the compelling need for a Federal Integrity Commission. However, we have also been deeply involved in establishing the basic principles necessary for the design of a successful and effective integrity commission. An ineffective commission is worse than no commission at all.

We submit that the omission or downgrading of any of the essential design principles we have identified will actually destroy the effectiveness of a federal anti-corruption body and will allow serious corruption to go largely undetected. The basic principles may be stated as follows:

1. That the Commission is an independent statutory body that is provided with the required resourcing and skilled professional staff to enable it to promote integrity and accountability and to enable it to prevent, investigate and expose corruption;
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;
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;
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;
5. That the Commission be governed by one Chief Commissioner appointed by the Governor-General and two Deputy Commissioners, appointed by the Governor-General or Minister on recommendations from a bipartisan Parliamentary committee. The Chief Commissioner is to be appointed for fixed non-renewable five-year terms, and must be a judge or a retired judge of the Supreme or Federal Court, or be qualified for appointment as a judge;
6. That the Commission be empowered to make findings of fact, which in an appropriate case, may be referred to a well-resourced and specialised unit within the DPP for consideration for prosecution. (The National Integrity Committee contemplated the ability for the agency to make corrupt conduct findings but ultimately came to this preliminary view by majority.)
7. The Commission must be subject to the oversight necessary to ensure that it always acts with absolute impartiality and fairness, and within its charter.

See Appendix A for a copy of the *Principles for designing a National Integrity Commission*. The Principles can also be found at <http://tai.org.au/content/corruption-fighters-and-former-judges-design-national-corruption-watchdog>

OVERVIEW

First we wish to provide an overview of our submission addressing the Australian Government's current proposal for a Commonwealth Integrity Commission (CIC).

In brief, our submission is that the government model falls disastrously short of providing an effective body to counter and expose corruption at a Federal level. Especially in relation to the examination of corruption in the public sector, this model will rightly be seen by the community as a sham, and as a deliberate political diversion designed to shield the public sector, and in particular politicians and their staff, from proper scrutiny and accountability.

DETAILED SUBMISSION

Two divisions

The notion that there should be two divisions each with different jurisdiction functions and powers is extremely odd. There is no independent research that suggests there is any "heightened risk and a need for enhanced scrutiny" when comparing the likelihood of corruption as between the law enforcement field and the public sector group.

Indeed, common sense and State based experience suggests that corruption in the public sector will be more deeply concealed, more prevalent and difficult to detect than in the law enforcement area. A comparison of the results achieved when examining the work of the Police Integrity Commission and ICAC in New South Wales shows a startlingly higher level of serious corruption in the public sector than in the New South Wales Police Force.

The attempt to distinguish corruption in the two sectors is quite artificial. It is open to the inference inevitably that the absence of wide corruption investigatory powers in the public sector is deliberately designed to make corruption in this area more difficult to detect and intended to protect politicians and other public officers. Even if that is not its purpose, the absence of such powers will certainly bring about this result.

In dealing with the law enforcement sector, the Government paper argues "These agencies operate closely with the corporate sector and those they regulate, and may be targeted by people or corporate entities or organised crime groups seeking to evade regulatory systems and enforcement action". However, the notorious Obeid case in New South Wales and the Secrecy scandal at Commonwealth level demonstrate that the public sector may be just as easily targeted by people or corporate entities seeking to enrich themselves by corruptly or dishonestly dealing with the public sector. Moreover, this likelihood extends to people working within the public sector who may well be themselves corrupted.

We submit that public sector corruption is more insidious, more pervasive and more difficult to detect than the corrupt conduct of police or border officials. It is quite artificial to suggest that there is a significant difference between the two as the government paper does. There is no justification for arguing that an anti-corruption body needs less powers in dealing with the public sector than it requires when dealing with law enforcement officers. If anything, the argument runs the other way.

We also submit that there is a significant practical difficulty in a model which contains two different systems of corruption control. A two-division arrangement of the type contemplated in the government model has the capacity to entail substantial additional resources and will involve the recruitment of staff with significantly different experiences and capabilities. An amalgamated body of this kind can be fraught with difficulties. Each division can undermine the effectiveness of the other and, in the worst case, endanger the whole operation.

In this regard, the government model will involve uncertainty, endless demarcation disputes and unnecessary costly litigation. For example, if a corrupt Border Force officer and a dishonest bureaucrat are engaged together in an enterprise involving corrupt conduct, which division operates and what powers are to be employed in the investigation?

We further submit that the proposed budget will be totally inadequate to carry out the massive task required by the two divisions system. Moreover, there is a real fear that most of the budget will go to the law enforcement sector, leaving the public sector division devoid of adequate funds and specialist staff.

Finally, on this point, we submit that the government model does not meet the criticisms levelled by academics, lawyers, civil society groups and the community. These criticisms focus on the present multi-agency arrangements at the Federal level. The criticism is that these agencies are fragmented, uncoordinated and in most instances without adequate investigative powers, experienced staff and adequate resources. This has been demonstrated by the history of their performance to date.

In this regard, the government might as well leave the Australian Commission for Law Enforcement Integrity (ACLEI) where it is, while no doubt providing much needed extra resources for its work. Whether it is because of lack of resources or government indifference, the public perception is that ACLEI has achieved very little since its inception.

The proposed model effectively leaves ACLEI running its own race as it does at the present time. If it were thought desirable to merge ACLEI within a new structure, it would be far more effective if the new structure were to have a wide overarching jurisdiction and possess, at the very least, all the powers presently conferred on the law-enforcement agency together with such further powers as are necessary to counter corruption in the public sector.

A final word on two divisions

It is not for nothing that the NSW public sector is investigated by ICAC whereas police misbehaviour is investigated by the Law Enforcement Conduct Commission (LECC). This works extremely well because the legislature has recognised that the two sectors, in a number of respects, require different handling and resources. Investigating corrupt police officers, for example, requires experience and know-how that is not required for investigating corruption in other areas. Nevertheless, the powers available to each agency are extensive and similar.

If contrary to these submissions, the CIC is to investigate both sectors, the proposed budget and level of staffing is, as we have said, so deficient as to be derisory. Regard should be had to the budgets provided for the NSW ICAC and LECC. In their aggregate, they far exceed the proposed budget for the proposed Federal Anti-corruption Commission, yet the latter Commission will, by its nature have a far greater field to investigate.

Our submission is that, in the Federal sphere, it would be more effective if ACLEI were to retain its present jurisdiction (with additional resources) and that the entire remainder of the Federal sphere were to come under the jurisdiction of the new anti-corruption agency. This would mean that ACLEI could continue its valuable work but do so far more effectively.

The new Federal Anti-corruption Commission could then oversee and investigate corruption in the ACCC, APRA, ASIC and the ATO.

Moreover, the CIC, in this model would monitor and investigate conduct within the entire Federal sphere but would do so with a full range of investigative and coercive powers. It could receive referrals from all other agencies, including ACLEI where appropriate.

SUBMISSIONS IN RELATION TO THE PUBLIC SECTOR DIVISION

1. Jurisdiction: Definition of corrupt conduct

A fundamental and critical feature in the design of a federal integrity body is the definition given to the phrase 'corrupt conduct'. In general terms the concept of corrupt conduct should be a broad one, including any conduct of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration, provided it is deemed to be serious or systemic.

Our preferred and more precise definition is attached as Appendix B.

The Government model proposes that the CIC's primary function will be the investigation of serious criminal conduct that represents corrupt conduct in the public sector. The paper continues "The public sector division will investigate conduct capable of constituting a nominated range of specific criminal offences. It will only investigate criminal offences, and will not make findings of corruption at large. This approach ensures that it is the courts making findings of criminally corrupt conduct."

We submit that the public sector division should not be limited to the investigation of criminal conduct. Admittedly, much serious corrupt conduct that has been found to occur throughout Australia has involved criminal conduct. But there is a range of serious corrupt conduct that does not constitute a criminal offence. For example, nepotism and favouritism in appointments and the granting of contracts; the misuse of confidential information, serious conflicts of interest and serious misuse of entitlements.

Mention should also be made of two further notorious categories: first the situation where large donations or financial favours to a political party or minister are followed by a decision conferring massive financial benefits on the donor or a related body; secondly the situation where senior public servants or ministers are seduced into accepting improper lobbying positions with corporations seeking benefits from the government.

In some of these instances, there could be the possibility of criminal misconduct. However the difficulties of proof in a criminal case make it often desirable to brand them as non-criminal corrupt conduct, capable of proof by analysis of circumstantial evidence to be assessed on the balance of probabilities.

In fact, these sometimes are among the worst and most prevalent form of corruption, difficult to uncover, difficult to prove and disturbingly far reaching in their consequences.

To limit the investigations into matters where criminal conduct is involved is a serious shortcoming of the Government's model for the proposed agency.

2. The threshold for an investigation in the public sector

The consultation paper states "The public sector division of the CIC will be responsible for investigating 'corrupt conduct' where the commissioner has a *reasonable suspicion* that the conduct in question constitutes a criminal offence."

The threshold 'reasonable suspicion' of a criminal offence before an investigation can begin is unreasonable. We submit that it is too high a threshold. It will effectively stop the investigation of many matters where the nature of the complaint coming before the anti-corruption body simply does not allow the agency, at that point, to form a reasonable suspicion that criminal conduct has, or may have, occurred, as happened with the investigation of the Bylong Valley coal mining licences and the involvement of Eddie Obeid and Ian Macdonald.

It is well accepted that where a complaint has been made and investigations are made extensively later, there will be uncovered the possibility of very serious corrupt conduct. This is certainly the situation at State level. Despite this commonplace experience, if the suggested threshold were in place at a Federal level, the agency would not be able to act, except in the rarest of circumstances. An investigation could not commence. It is said that the Obeid inquiry in New South Wales was triggered by an anonymous informant. It would be impossible for such a matter to have been investigated under the Government's proposed model.

This high threshold will stop very many bona fide investigations at the outset.

3. Who may be investigated?

We submit that the range of persons who may be investigated under the Government model is too narrow. The consultation paper refers to 'public officials, service providers, contractors, parliamentarians and their staff'. This list excludes anyone outside the public sector who dishonestly or improperly influences or attempts to influence public decision making, for example a fraudulent tenderer in a Government procurement situation.

We draw the Government's attention to the fact that this wider jurisdiction is now available throughout most state ICAC's. Consequently, it would be a most severe limitation on jurisdiction to exclude this type of dishonest conduct from the definition of corruption at a Federal level.

4. Can the agency investigate on its own initiative?

The Government model effectively precludes the public sector division from investigating on its own initiative. It can only do so when it comes across corruption in the course of an existing investigation and where the new corruption relates to a criminal offence and where the high threshold is met.

5. Whistle-blower complaints

The consultation paper states that any member of the public can refer an allegation of corruption to the law enforcement division. However, in marked contrast, an individual cannot make a similar reference to the public sector division. The complaint must come from a department or other agency. This appears to be a measure designed to stifle whistle-blower complaints.

We submit that there is no justification for this distinction. Once again, it places the public sector in a privileged position which, in integrity terms, is quite untenable. Moreover, this limitation will prevent the investigative process at the outset.

It will foster public sector corruption and disadvantage a potential whistle-blower. What if, for example, a senior public servant becomes aware that the head of the agency is behaving corruptly? In New South Wales in this situation, the whistle-blower could refer the matter directly to ICAC. In the Federal sphere, however, the public servant cannot refer the allegation to the CIC but must refer it to the head of the agency. What chance is there of the allegation then making its way to the CIC? We submit that this limitation represents a serious flaw in the Government model.

The consultation paper also states “The CIC will not investigate direct complaints about Ministers, Members of Parliament or their staff received from the public at large”. This restriction is totally unacceptable and will be so regarded by the Australian public.

6. Public hearings

It is now generally accepted that it is difficult to uncover corruption without the aid of public hearings. Of course public hearings should be held sparingly and only where they are demanded by the public interest. However, this model negates them altogether in the public sector division. A corrupt policeman may be the subject of a public hearing... but not a corrupt politician. How can this possibly be fair or be justified?

Furthermore, the year-long Hayne Banking Royal Commission has amply demonstrated the value of public hearings. It was never suggested that the bank staff, even at the most senior level, should be examined in private. The same applies to the McClelland Royal Commission into paedophilia. It is noteworthy that the *Commonwealth Parliamentary Commission (Judicial Misbehaviour Incapacity) Act 2012* requires that federal judicial officers be investigated primarily in public hearings, in contrast to the Government’s proposed model that provides for public servants and parliamentarians to be investigated in private and without any public hearings.

We submit that this is a massive failing in the Government model.

In addition to this no public findings of corruption can be made in the public sector and no public report is to be issued. An anti-corruption division that does not permit public hearings, that makes no public findings and does not issue a public report represents a manifest failure in the endeavour to limit corruption in the public sector. Unless serious and systemic corruption is publicly exposed, attempts to combat it will be futile.

These six matters we have raised, when taken in combination, both as to jurisdiction and operation, will effectively prevent the agency proposed by the Government from undertaking serious investigation of corrupt conduct and in fact uncovering it and exposing it to the public.

As we have submitted earlier, it is better to have no anti-corruption agency than one that is designed to be ineffective.

A LESSON FROM HISTORY

There is a significant lesson to be learnt from the setting up of Victoria’s Independent Broad-based Anti-corruption Commission (IBAC). The Baillieu Government set up a weak corruption watchdog to

avoid being damaged by IBAC's investigations. The definition of corruption was too narrow and the threshold for investigation too high.

IBAC in this form was seen as a sham and a toothless tiger. Well informed political opinion pointed to these features as a travesty. Many commentators saw the establishment of a deficient corruption body as an important factor in the demise of a one term government. If the present model for a Commonwealth anti-corruption agency were enacted, it would undoubtedly be seen as a sham designed to protect large sections of the public sector, including politicians, from proper scrutiny.

The outcome for the Morrison Government would be fraught, as it was for the Baillieu Government in Victoria.

FINAL SUBMISSION

The Governments consultation paper proceeds on a flawed assumption. The role of an anti-corruption agency is not to ensure convictions for criminal offences. Nor is its core task concerned with gathering evidence for a subsequent criminal prosecution. Its primary aim is to uncover serious corruption in the field of public administration and to publicly expose it where that is appropriate.

To this end it is given wide and special coercive and investigatory powers. It is not bound by the laws of evidence and does not function as a judicial body as does a court of law. It is an arm of the executive government and its role is entirely investigative and declamatory.

Corruption in the public sector is often buried very deeply. It can often be uncovered only by the use of strong coercive powers. However, as the experiment in South Australia has shown, investigations carried out far from the public eye do not promote effectively the aims of an anti-corruption agency. Moreover, any misconduct of the anti-corruption agency is also hidden from public view.

An anti-corruption agency, by the use of its coercive powers, often obtains evidence that is not admissible in a court of law. For example, witnesses are required to answer questions that may tend to incriminate them. If this happens in public, then reputations are undoubtedly tarnished. In many cases it will nevertheless be appropriate for this admission of dishonesty to be shared with the community.

A trade-off for this coercive power is that the incriminating evidence thus secured, even if it be made publically, cannot be used against the person in a subsequent trial for a criminal offence related to or arising out of their corrupt conduct.

Moreover, findings of fact are made on the balance of probabilities and not to the criminal standard of beyond reasonable doubt. For these reasons, a prosecution may never be commenced, or if commenced, may be doomed to failure. However, this should not be a concern for an anti-corruption agency which we stress is not a criminal court but an investigative body whose role is to expose corruption and to deter its insidious encroachment in public administration. The number of convictions that follow upon an anti-corruption investigation is not a true measure of its success. The evidence before an anti-corruption agency ordinarily differs markedly to that that can be led in criminal proceedings. We have referred above to the example of admissions by a person in a public inquiry held by the anti-corruption agency which cannot be used in criminal proceedings. Moreover, the conduct of the criminal proceedings is not under the control of the anti-corruption agency and the skill and experience of prosecutors differ.

Public hearings, public findings and public reports have the capacity to damage reputations. This cannot be denied. However, provided a high level of procedural fairness is observed and proper care is taken not to allow a hearing to deteriorate into a ‘show trial’ – and provided there are appeal and/or review rights – the public interest and public benefit is secure and valuable. An appropriate balance must be taken in the public interest.

Much of the Governments concern, we submit, arises from a misconception that the work of ICAC in New South Wales and the Corruption Commission in Western Australia has been conducted unfairly and has unjustly tarnished reputations.

We submit that a fair analysis of the situation, for example in New South Wales, demonstrates that these claims are quite false. They have been manufactured and promoted by a hostile press and by those whose reputations have been found wanting by ICAC. Almost without exception, appeals from ICAC decisions to the Supreme Court of New South Wales in relation to corrupt conduct findings have been emphatically dismissed by the superior courts.

The current inspector of ICAC has also dismissed most of these claims as pedantic and unjustified.

Perhaps the most accurate test of the falsity of this concerted attack on New South Wales ICAC is the high praise given in Parliament and by public statements endorsing its work. Two Liberal Premiers, O’Farrell and Baird, praised New South Wales ICAC for its work in uncovering corruption especially among politicians and their business associates.

Appendix C contains statements from the two Liberal Premiers which roundly give the lie to these inaccurate and unfair criticisms. Unfortunately those criticisms appear to have been accepted by the Morrison Government in preparing its model and consultation paper. They ought to have been rejected outright

The National Integrity Committee has published a series of briefing papers regarding the design of a National Integrity Commission. These can be found at <http://tai.org.au/content/national-integrity-commission-papers>

If you require any further information or would like to clarify any of the issues raised in this submission please contact Ms Kathleen O’Sullivan, at The Australia Institute at mail@tai.org.au or 02 6130 0530.

Yours sincerely,

The Hon Anthony Whealy QC

The Hon David Ipp AO QC

The Hon David Harper AM QC

The Hon Stephen Charles AO QC

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The National Integrity Committee

Attachments

Appendix A: Principles for designing a National Integrity Commission

Appendix B: Definition of Corrupt Conduct

Appendix C: Statements from NSW Premier’s Barry O’Farrell and Mike Baird

Principles for designing a National Integrity Commission

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

BACKGROUND

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.¹ 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

¹ 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.²

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

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

- 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.

² 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.³ 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.⁴

- 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.⁵

³ Knaus (2017), *ICAC weakening due to budget cuts and job losses, union and NSW Labor warn*, The Guardian, 17th 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>

⁴ 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>

⁵ 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.⁶ 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.”⁷

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.⁸

The necessary investigative powers include:⁹

- 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

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

⁷ Greiner (1988), NSW Parliamentary Hansard, 26th May 1988

⁸ See *NSW Independent Commission Against Corruption Act 1988* and *Queensland Crime and Corruption Act 2001*

⁹ 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'.¹⁰ 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.

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 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

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

damage and unfairness, publicity itself is a protection against administrative excess.¹¹ 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.¹²

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.¹³ 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.¹⁴ 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 it and the valuable information they have will be lost."¹⁵ Former NSW ICAC

¹¹ Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC* pp 62

¹² Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC* pp 60-61

¹³ MacLennan, 2016, *ICAC Commissioner Bruce Lander pushes for public hearings to ensure transparency*, ABC, 31st October 2016, <http://www.abc.net.au/news/2016-10-31/icac-commissioner-bruce-lander-wants-public-hearings-in-sa/7980960>

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

¹⁵ Gerathy, 2016, *ICAC inspector calls for end to public hearings to stop 'trashing of reputations'*, ABC, 12th May 2016, <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

Commissioner David Ipp AO QC has said that “Its main function is exposing corruption; this cannot be done without public hearings.”¹⁶

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.¹⁷

- 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 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

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

¹⁷ In *Victoria v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 97.

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.¹⁸

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.

¹⁸ 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.

National Integrity Committee – the definition of corrupt conduct

General nature of corrupt conduct:

- 1) Corrupt conduct is conduct of the kind set out in subsections 2) and 3) below, provided that such conduct would, if proven in criminal proceedings, be a criminal offence, a disciplinary offence, reasonable grounds for dismissal, or a breach of an applicable code of conduct.
- 2) Subject to subsection 1), corrupt conduct is:
 - a. Any conduct of any person that has the potential to involve or induce the placing by a public official of private interests over the public good in public office; or
 - b. Any conduct of any person that has the potential to impair the efficacy or probity of an exercise of an official function, or public administration, by a public official; or
 - c. any conduct of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration; or
 - d. any conduct of a public official or former public official that constitutes or involves a breach of public trust; or
 - e. any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.
- 3) Without limiting subsection 2), and subject to subsection 1), conduct that involves any of the following is capable of being corrupt conduct:
 - a. official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition);
 - b. bribery;
 - c. blackmail;
 - d. obtaining or offering secret commissions;
 - e. theft;
 - f. perverting the course of justice;
 - g. embezzlement;
 - h. election bribery;
 - i. breaches of lobbying codes of conduct or electoral funding laws;
 - j. election fraud;
 - k. tax evasion;
 - l. revenue evasion;
 - m. illegal drug dealings
 - n. illegal gambling;

- o. obtaining financial benefit by vice engaged in by others;
 - p. bankruptcy and company violations;
 - q. collusive tendering;
 - r. impropriety in government procurement and tender processes;
 - s. fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources;
 - t. dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage;
 - u. defrauding the public revenue;
 - v. fraudulently obtaining or retaining employment or appointment as a public official.
- 4) Conduct may amount to corrupt conduct under subsections 2) or 3) even though it occurred before the commencement of that subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.

Legislative Assembly Hansard – 24 October 2013¹

Mr BARRY O'FARRELL: Like everyone else, I was absolutely appalled and horrified by the revelations in the Independent Commission Against Corruption about the actions of Eddie Obeid and Ian Macdonald. One gets an insight into the Labor way of operating when Eddie Obeid's son says, "You got us wrong. It wasn't \$100 million we stood to gain; it was only \$70 million". Is it any wonder, with that sort of mentality, that a \$3 million bribe is not noticed by the Leader of the Opposition? Nothing was done about a criminal act involving \$3 million because it was not enough. I note that next week the Parliament will receive the corruption prevention report of the Independent Commission Against Corruption into matters arising from Operation Jasper and Operation Acacia which I await with interest and on which we will take action.

Those Independent Commission Against Corruption investigations have served to highlight the value and importance of the State's watchdogs. Whether it is the Independent Commission Against Corruption—an achievement of a Liberal-Nationals government—the Auditor-General, the Office of the Ombudsman, which is another achievement of a Liberal-Nationals government, or the Police Integrity Commission, they are all important insurance for the public to ensure that governments do the right thing, and if governments do not do the right thing they will be caught out. Not only has the Government provided increased and strengthened powers to many of the watchdogs, including the Independent Commission Against Corruption; it has also increased the budget for the watchdogs—\$122 million alone, which is an increase of about 20 per cent over Labor's last budget.

That demonstrates our commitment to openness, transparency and ensuring that the public can have confidence in the way the Government, or indeed the Opposition, operates in New South Wales. I inform the House that the Commissioner of the Independent Commission Against Corruption, David Ipp, has advised me that he intends to retire on 24 January next year. When in opposition I repeatedly expressed my concern that the inner spring of the Independent Commission Against Corruption had wound down. No doubt Commissioner Ipp has reinvigorated the organisation and, through his efforts and leadership alone, restored public confidence in the commission and reminded all those thinking of doing the wrong thing that they will be found out.

I thank David Ipp for his extraordinary efforts as the Commissioner of the Independent Commission Against Corruption. He departs with the undying gratitude of this Parliament and of our State, and we wish him a long and healthy retirement. Only a year or two ago members opposite told me that the appointment of David Ipp was the last mistake of the member for Toongabbie when he was Premier. They argued that the then Premier thought he was appointing someone who was winding down in the twilight of his judicial career. I am delighted that David Ipp proved that critic wrong. I prefer to take the more generous approach of suggesting that David Ipp's appointment to the Independent Commission Against Corruption was probably one of the best decisions, if not the best decision, that the then Premier made. I am sure he agrees with me.

I can inform the House that I am proposing the appointment of Supreme Court Judge Megan Latham as Commissioner Ipp's replacement. Today I have written to the chairman of the Committee on the Independent Commission Against Corruption to ask it to fulfil its statutory obligation to review the nominee for the position of Commissioner of the Independent Commission Against Corruption. Prior to her elevation to the Supreme Court in 2005, Justice Latham served in the District Court, as well as being a Crown prosecutor and Crown advocate. She is highly respected across the legal community as a distinguished judge with extensive experience in both public and criminal law. I am confident that she will pursue corruption with the same vigour, without fear or favour, as Commissioner David Ipp. If approved, the Governor will be asked to appoint Justice Latham for five years from 28 January 2014. The nomination reflects my Government's continued commitment to accountability, strong public watchdogs and integrity in government.

¹ Available at: <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-54526/link/2132>

MIKE BAIRD'S STATEMENT TO THE MEDIA²

Today's report from ICAC ends a very sad chapter in the history of NSW politics.

I think, importantly, what we saw in the revelations and findings that have been made in these reports, collectively, they have undermined the public's trust in the institution of government.

I am sorry that that has happened.

I'm sorry on behalf of my members of parliament that have done the wrong thing.

They expect better, from members of parliament, they expect better from government and I can assure you I'm determined that we will do exactly that.

Ultimately, what we have seen is a number of recommendations, a number of findings that have come forward.

All of those will show actions that should never ever have happened.

I think when we look at it in many respects, the size and the number, there is a deep dismay, there is a deep anger that comes, but at the same time the findings have been made and it's time to move forward, time to put a line in the sand on this sorry chapter and do everything we possibly can to restore the trust back into government that has clearly been lost.

As part of this, the entire institution of parliament has been swayed by these allegations, by what has taken place, but we continue to take actions to ensure they won't happen again.

A number of things we've done in terms of campaign finance, donation, there is more to do in that space but I can assure you that this government will do everything we can to ensure there is no corruption.

We have a zero-tolerance level to corruption.

² Available at: <https://amp.dailytelegraph.com.au/news/nsw/icac-liberals-pay-the-price-as-mike-baird-apologises-for-political-rogues/news-story/725a657d0e3150cad901e9b0f1acf7c5>