Commonwealth Integrity Commission (CIC) Consultation: Submission on the CIC Bill Exposure Draft

This submission is made on behalf of the National Integrity Committee.

We are an independent group of retired judges who have been involved in advocating the need for a National 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.

The Exposure Draft proceeds on a flawed assumption. The primary 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 declaratory. It is not part of the criminal justice system.

The Exposure Draft does not meet the primary purpose of a National Integrity Commission, which is to enable scrutiny and enhance accountability of government. It is not even clear if the proposed legislation covers Ministerial conduct which may be deemed to be corrupt.

In brief, our submission is that the government proposal falls disastrously short of providing an effective body to counter and expose corruption at a National 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. It will bring the government into justified contempt and harm Australia's reputation. Our stocks in the integrity field are presently low and this proposal will further diminish them, and significantly so.

In our view, an ineffective commission is worse than no commission at all.

The essential principles necessary for the design of an effective integrity commission

We have been deeply involved in establishing a set of principles necessary for the design of an effective integrity commission. We submit that the omission or downgrading of any of these essential design principles will destroy the effectiveness of a National anti-corruption body and will allow serious corruption to go largely undetected. The basic principles are that the Commission:

1. is an independent body that is provided with adequate resourcing and skilled professional staff to enable it to promote integrity and accountability that will enable it to prevent, investigate and expose corruption;
2. 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 Commission deems the conduct to be serious or systemic;

3. be granted the full investigative powers of a Royal Commission to undertake its work, to be executed at the discretion of the Commission;
4. 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. 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. be empowered to make findings of fact, and, in appropriate cases, findings of corrupt conduct (however it is prohibited from making a finding that a criminal offence has occurred). These findings may be referred to a well-resourced and specialised unit within the Commonwealth Director of Public Prosecutions for consideration;
7. must be subject to the oversight necessary to ensure that it always acts with absolute impartiality and fairness, and within its charter.

The format of this submission

Our submission is in three parts: the first part provides a brief outline of the structure of the Bill and its distinction between law enforcement agencies and other public sector bodies; the second part examines broadly the manner in which the Exposure Draft fails to meet the principles we have earlier identified; and the third part examines some significant sections of Exposure Draft in detail, reinforcing the arguments in Parts 1 and 2.

PART 1

TWO DIVISIONS

The CIC Bill is designed around a central idea: that in dealing with corruption at the federal level, it is appropriate to distinguish between, on the one hand, those that have a role in law enforcement; and, on the other, the executive government together with parliamentarians, members of their staff, higher education providers and research bodies. As reflected in the Bill, this distinction warrants law enforcement agencies being subjected to an anti-corruption regime which is markedly more rigorous than that which applies to others who come within reach of the Bill.

The justification for this distinction is not self-evident. 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. As will later appear, this distinction leads to considerable complexities in the Bill. Moreover, it inevitably gives rise to a perception that public sector corruption is deserving of more lenient treatment than law enforcement corruption, a perception likely to jeopardise public confidence in the work of the Commission. Particularly is this so in a context in which no other State or Territory

incorporates this distinction in its anti-corruption legislation and no State or Territory Commission is constrained as the CIC will be if this Bill were to pass into law.

Indeed, common sense and State based experience suggests that corruption in the public sector will be more deeply concealed, more prevalent, and more difficult to detect than in the law enforcement area. A comparison of the results achieved when examining the work of the former NSW Police Integrity Commission, the NSW Law Enforcement Conduct Commission and the NSW Independent Commission Against Corruption shows a startlingly higher level of serious corruption in the public sector than in the NSW Police Force. This opinion is reinforced by the views of the Queensland Crime and Corruption Commission, a body which deals with corruption in both spheres.

The attempt to distinguish corruption in the two sectors is quite artificial. It is inevitably open to the inference 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 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".[1] However, the notorious Obeid case in NSW and the Securency scandal at the Commonwealth level demonstrate that the public sector may be just as easily targeted, perhaps more so, 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 itself 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. 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.

PART 2

THE PRINCIPLES FOR DESIGNING A NATIONAL INTEGRITY COMMISSION

The definition of corrupt conduct

A fundamental and critical feature in the design of a National integrity body is the definition given to '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.

The Consultation Paper released in December 2018, states "The Public Sector Division will investigate conduct capable of constituting a nominated range of specific criminal offences. It will

[1] Consultation Paper, A Commonwealth Integrity Commission—proposed reforms, December 2018

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." This concept is carried through to the Exposure Draft.

Although the Consultation Paper and CIC Fact Sheet[2] speaks of the "Public Sector Integrity Division" and the "Law Enforcement Integrity Division", the Exposure Draft does not divide the CIC in this way. For presently relevant purposes, it distinguishes between law enforcement agencies (and staff members of these agencies) on the one hand and public sector agencies and parliamentarians (and, in each case, members of their staff) on the other.

We submit that the limitation in the investigation of corruption involving the public sector and parliamentarians to criminal offences is a fundamental flaw in the Exposure Draft. Corruption investigations into public sector agencies should not be limited to the investigation of criminal conduct. Nor should those into parliamentarians or their staff. 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;
- the granting of contracts without appropriate scrutiny;
- the misuse of confidential information;
- misuse of public funds for political gain;
- serious conflicts of interest and serious misuse of entitlements;
- serious breaches of Codes of Conduct.

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 financial or other benefits on the donor or a related body; second 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 also arise 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 of the Public Sector Division into matters only where criminal conduct is involved is a serious shortcoming in the Exposure Draft and if maintained, this notion dooms the legislation to failure.

[2] Commonwealth Integrity Commission Fact Sheet, November 2020 https://www.ag.gov.au/sites/default/files/2020-11/Commonwealth%20Integrity%20Commission%20Fact%20Sheet.pdf

The threshold for an investigation in the public sector

The threshold of '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 Commission simply does not allow the agency, at that point, to form a reasonable suspicion that criminal conduct has, or may have occurred. The investigation of the Bylong Valley coal mining licences and the involvement of Eddie Obeid and Ian Macdonald would not have commenced if this had been the statutory threshold in NSW.

It is well accepted that where a complaint has been made and extensive investigations are made subsequently, there may 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 simply not commence.

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

Who may be investigated?

We submit that the range of persons who may be investigated by the Public Sector Division under the Exposure Draft is too narrow. The Exposure Draft 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 integrity bodies. Consequently, it would be a tellingly severe limitation on jurisdiction to exclude this type of dishonest conduct from the definition of corruption at a federal level.

Can the agency investigate on its own initiative?

The Exposure Draft effectively precludes either public sector agencies, or parliamentarians or their staff, from being investigated on the Integrity Commissioner's own initiative. The Integrity Commissioner can only do so when he or she comes across corruption in the course of an existing investigation and where the new corruption relates to a criminal offence.

Whistle-blower complaints

The Exposure Draft states that any member of the public can refer an allegation of corruption to the Integrity Commissioner if the allegation implicates staff in the law enforcement sector. However, in marked contrast, the Commissioner cannot accept an allegation which relates to a staff member of a public sector agency, a parliamentarian, or a staff member of a parliamentarian. The complaint in these cases must come from a limited range e.g., a department, the Attorney or other agency. This appears to be a measure designed to stifle whistle-blower complaints. Indeed, the Exposure Draft effectively discourages whistle-blower participation.

We submit that there is no justification for this distinction. Once again, it places the public sector, and parliamentarians, 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 and parliamentary 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 the Independent Commission Against Corruption. 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 Exposure Draft.

In effect, the Exposure Draft results in a situation where the CIC will not be able to 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.

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 relation to the public sector and to parliamentarians. A corrupt police officer 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 Exposure Draft which 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's model.

In addition to this, no effective public findings of corruption can be made against parliamentarians or their staff or against staff in the public sector and no effective 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 and in the Federal Parliament. 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.

PART 3

AN ANALYSIS OF SIGNIFICANT SECTIONS OF THE EXPOSURE DRAFT

The legislative ramifications of the distinction between law enforcement agencies and other public sector bodies are starkly evident in the Bill, which is further notable for casting an especially protective blanket over parliamentarians and their offices.

The Bill does not include a definition of "corruption". Rather, it adopts as key concepts the expressions "corruption issue" and "corrupt conduct". These apply to issues relating to, and conduct engaged in by, a member of a "regulated entity" - that is, a member of:

(a) a law enforcement agency; or
(b) a public sector agency; or
(c) the office of a parliamentarian; or
(d) a higher education provider; or
(e) a research body.

For present purposes, the expression "regulated entity" may therefore be taken to embrace all branches and sectors of the executive government, together with the office of parliamentarians and with the further addition of higher education providers and research bodies. What is a "corruption issue" and what is "corrupt conduct" will vary according to whether the issue or the conduct in question involves a member of the staff of a law enforcement agency on the one hand or a member of a different "regulated entity" on the other.

The expression "corruption issue" is defined in s.16. But, in one of the many quirks which makes this Bill difficult to follow, this definition requires the reader to first grapple with the definitions (to be found in s.5) of the allied expressions "a law enforcement corruption issue" and "a public sector corruption issue".

It is necessary to bear these composite expressions in mind before unpacking the definition of "a corruption issue". A law enforcement corruption issue is defined in s.5 as "a corruption issue relating to a law enforcement agency"; and these agencies are specified in s.7 as being:

- the Australian Competition and Consumer Commission;
- the Australian Criminal Intelligence Commission;
- the Australian Federal Police;
- the Australian Prudential Regulation Authority;
- the Australian Securities and Investments Commission;
- the Australian Taxation Office;
- AUSTRAC;
- the Department of Home Affairs;
- the Agriculture Department; and
- "any other "Department of State of the Commonwealth … or body … that is prescribed".

Section 5 also defines a "public sector corruption issue". It means a corruption issue relating to:

- a public sector agency (an expression which is awkwardly defined in s.8, but which undoubtedly covers the great majority of those generally classified as 'public servants');

- the office of a parliamentarian;
- a parliamentarian;
- a higher education provider; or
- a research body.

The Bill's concern to shield parliamentarians and the public sector from the more intense scrutiny given to the law enforcement sector can be seen clearly in the convergence of ss.16 and 17. It is to be found in the way those sections apply the definitions of the expressions "corruption issue" and "engages in corrupt conduct". The definition in s.16 of a "corruption issue", and that in s.17 of "engages in corrupt conduct", differ as between members of a law enforcement agency on the one hand and members of other regulated entities on the other. In defining a "corruption issue", s.16 turns first to a person who is a staff member of a law enforcement agency. For such a staff member, a corruption issue is "a law enforcement corruption issue"; and, as provided in s.16(1)(a), it is such an issue if it is an issue of whether that person:

(i) has, or may have, engaged in corrupt conduct; or
(ii) has, or may be, engaging in corrupt conduct; or
(iii) will, or may at any time in the future, engage in corrupt conduct.

After providing in s.16(1)(b) for a person who was, as opposed to is, a staff member of a law enforcement agency, s.16 proceeds to apply the definition of "corruption issue" to parliamentarians, to members of the staff of a parliamentarian, to a staff member of a public sector agency and to staff members of a higher education provider or research body.

Staff members of a "public sector agency" are covered by s.16(1)(c). This sub-section provides that, for them, a "corruption issue" is simply an issue of whether that staff member has engaged in corrupt conduct, or is engaging in corrupt conduct. By contrast with s.16(1)(a), there is in s.16(1)(c) no reference to conduct in which the staff member **may** have engaged or **may** be engaging; and there is no clause (iii) – "or will, or may at any time in the future, engage in corrupt conduct". In other words, in contrast to the provision in s.16(1)(a) governing the staff of a law enforcement agency, a literal reading of s.16(1)(c) when read together with s.16(1)(a) results in the conclusion that the CIC will not be empowered to investigate conduct, however corrupt, in which a staff member of a public sector agency **may** have engaged in the past, as distinct from conduct in which a staff member of a public sector agency **actually** engaged in the past; or **may** be, as distinct from **actually** is, engaging now; or **might**, as distinct from **actually**, engage in the future. But, at the time any investigation begins, its purpose will necessarily be to discover whether the conduct under investigation may have been engaged in, or is now being engaged in, or might in the future be engaged in. In other words, the distinction here between s.16(1)(a) and s.16(1)(c) is a distinction without a difference.

That is not so in relation to the distinction made in s.17 between members of the staff of a law enforcement agency and others covered by the expression "a regulated entity". That distinction reflects the seminal importance, for the purposes of the Government's proposed integrity scheme, of the separation of law enforcement agencies from the remainder of the category of regulated entities. By s.17(1), a staff member of a law enforcement agency engages in corrupt conduct if that person:

(a) abuses that person's office; or

(b) perverts the course of justice; or
(c) engages in conduct that, having regard to the duties and powers of the staff member as a staff member of that agency, involves, or is engaged in for the purpose of, **corruption of any other kind**.

Two observations may be made, in parenthesis, here. First, what constitutes "corruption of any other kind" is uncertain, because the Bill does not include a definition of the word "corruption". Secondly, s.17(8) applies to staff of the CIC, and does so in essentially the same terms as those of s.17(1).

These provisions are to be contrasted with those of s.17(2). This sub-section deals with staff members of public sector agencies. It contains no reference to "corruption of any other kind". Corrupt conduct for such persons is much more narrowly defined. Staff members of public sector agencies engage in corrupt conduct only if they:

- abuse their office;
- or pervert the course of justice;
- **and** if they engage in conduct which constitutes a listed criminal offence under s.18.

Section 17(4) applies to a staff member of the office of a parliamentarian, and s.17(5) applies to parliamentarians themselves. The terms of these sub-sections are in essentially the same terms as s.17(2) in its application to staff members of public sector agencies. For the purposes of the Bill therefore, none of these categories of persons engages in corrupt conduct unless their abuse of office, or their perversion of the course of justice - however egregious it might otherwise be - amounts to a "listed" criminal offence under s.18. That list is therefore important. The offences included in it are:

- offences against s.30K of the *Crimes Act 1914* (involving the obstruction or hindering of the performance of services);
- offences against the *Criminal Code* (involving the bribery of foreign public officials; or the proper administration of government; or money laundering; or computer offences; or interfering with accounting records);
- offences against the *Proceeds of Crimes Act 2002* (involving the contravention of restraining orders or dealing with forfeited property);
- an offence against the *Autonomous Sanctions Act 2011*; or the *Biosecurity Act 2015*; or the *Charter of the United Nations Act 1945*; or the *Defence of Trade Controls Act 2012*; or the *Foreign Influence Transparency Scheme Act 2018*; or the *Public Interest Disclosure Act 2013*;
- an offence against Division 1 Part 8 of the Bill (which requires the giving of information or the production of evidence); or against Division 2 Part 8 of the Bill (which deals with the conduct of hearings); or against s.156 (failing to comply with an order requiring the provision of information or assistance necessary to access or copy data held on a computer); or against s.276 (victimisation); or against s.277 (concealing corrupt conduct).

By standing alone in their references to "corruption of any other kind", and thus limiting those references to staff of a law enforcement agency or to staff of the CIC itself, sub-ss.(1) and (8) of s.17, when read with sub-ss (2), (4) and (5), have the effect that **staff of public sector agencies, the staff**

of parliamentarians, and parliamentarians themselves, can engage without fear of CIC investigation in "corruption of any … kind" provided only that it does not amount to a "listed" criminal offence and that it is not an abuse of office, or a perversion of the course of justice.

By s.19(1), "[a] corruption issue relates to a regulated entity" - that is a law enforcement agency, a public sector agency, the ***office*** of a parliamentarian, a higher education provider, or a research body – "if the corruption issue relates to corrupt conduct of a person as a staff member of the entity." But s.19(3) provides that "[a] corruption issue relates to a ***parliamentarian*** if the corruption issue relates to corrupt conduct of the parliamentarian ***as a parliamentarian***." This gives rise to the question whether corrupt conduct by a parliamentarian when discharging ministerial responsibilities would give rise to a corruption issue which, in the terms of s.19(3), "relates to corrupt conduct of the parliamentarian as a parliamentarian." The doctrine of the separation of powers provides a peg for an argument that a parliamentarian, when acting as a member of the executive government, is not acting "as a parliamentarian". It is true that, as defined in s.5, the word "parliamentarian" includes a Minister who is not a senator or member of the House of Representatives. But the problem is not thereby removed. By explicitly including a Minister who, although not a member of either House, is appointed by the Governor-General pursuant to s.64 of the Constitution, and by not including in that definition a Minister who is an elected member of Parliament, a doubt remains about the position of those in the latter category who engage in corrupt conduct in their role as a member of the executive government. As a member of the government, the Minister would be accountable to Parliament for that misconduct; and therefore, the argument would run, excluded from the statutory definition.

For these reasons, the Bill would be improved were the relevant words in the definition of "parliamentarian" to read: *a Minister of State **whether or not** that Minister is a senator or member of the House of Representatives and whether or not the corruption issue relates to corrupt conduct of the Minister as a Minister or as a parliamentarian*.

How referrals are made

Under the Bill, the Commonwealth Integrity Commissioner can do nothing unless a reference is received from a source empowered to provide it. If the issue is a law enforcement corruption issue, one such source is a member of the public; s.44(1) provides that "[a]ny person may refer to the Integrity Commissioner … an allegation, or information, that raise a law enforcement corruption issue." And the reference may be made anonymously: s.44(2)(b). **There are no equivalent provisions in relation to a public sector corruption issue**. While different provisions allow for references to the Integrity Commissioner by different office holders in relation to different corruption issues, a member of the public, even if armed with powerful evidence of public sector corruption, cannot refer that corruption issue to the Commissioner. This is despite the fact that one of the functions of the Integrity Commissioner is "to detect corrupt conduct in regulated entities and by parliamentarians": s.25(c); and another is "to investigate and report on corruption issues": s.25(d).

By s.33(1) of the Bill, the Attorney-General "may refer to the Integrity Commissioner an allegation, or information, that raises a corruption issue relating to a regulated entity (other than the office of a parliamentarian)." This places the Attorney-General in the unique position of being able to refer to the Integrity Commissioner an allegation, or information, which raises a corruption issue no matter

whether it is a law enforcement corruption issue or a public sector corruption issue – and no matter that it is neither serious nor systemic. This gives the Attorney-General power denied to all others. The risk that it will be used to gain an illegitimate political advantage, with its associated hazards to the administration of justice, is reduced by s.33(2), which provides that a reference by the Attorney-General may only be made if he or she "reasonably suspects that the offence to which the corruption issue relates has been, or is being, committed." This qualification on the power also applies to "the responsible Minister for a regulated entity that is … a public sector agency" , who "may refer an allegation or information … only if the responsible Minister reasonably suspects that the offence to which the corruption issue relates has been, or is being, committed." Likewise, a parliamentarian may refer an allegation or information that relates to "the parliamentarian or the parliamentarian's office … only if the parliamentarian reasonably suspects that the offence to which the corruption issue relates has been, or is being, committed."

The protection given by the necessity for a reasonable suspicion is another instance in which parliamentarians and public sector entities and those who work in or for them are given protection where members of law enforcement agencies are not. There is no necessity for a reasonable suspicion if the allegation or information in question relates to a member of a law enforcement agency.

As soon as practicable after the head of a regulated entity (other than the office of a parliamentarian or of an intelligence agency) becomes aware of an allegation, or information, that raises a corruption issue that relates to the entity, that head must notify the Commissioner in writing of that issue: s.37(1). If the entity is a law enforcement entity (but not otherwise), the head must also "identify whether the issue is a significant corruption issue." That expression - "a significant corruption issue" - is defined in s.5 as a corruption issue that relates to a law enforcement agency and:

- if an agreement made pursuant to s.27(1) is in force for the agency, "a significant corruption issue" is an issue agreed to be thus pursuant to that agreement; or
- if no such agreement is in force, is an issue giving rise to the possibility of serious or systemic corruption; or
- in any case, is of a kind prescribed by rules made for the purposes of the definition of "a significant corruption issue" in s.5.

It follows that "a significant corruption issue", as defined in the Bill, can only arise in the case of a law enforcement agency; it cannot arise in the case of a public sector agency, or in relation to a parliamentarian, or a parliamentarian's office (to staff of a higher education provider or research body).

As mentioned above, the definition of a significant corruption issue includes an issue which by agreement is designated as such pursuant to s.27(1). Section 27(1)(a) provides that the Integrity Commissioner and the head of a regulated entity - other than the office of a parliamentarian, but including not only a law enforcement agency but also a public sector agency – "may enter into a written agreement … in relation to … the level of detail required to notify the Integrity Commissioner under section 37 of a corruption issue that relates to the entity". By s.27(1)(b), the agreement may, if – but only if - the entity is a law enforcement agency, include a description of the kinds of issues that are significant corruption issues in relation to the entity. As stated above, if no relevant agreement has been made between the Integrity Commissioner and the head of the relevant law

enforcement entity, a "significant corruption issue" will be an issue which raises questions of serious or systemic corruption; and, in any case, is in issue of a kind that is prescribed by rules made for this purpose.

Section 37(1) is concerned with the action which must be taken when the head of a regulated entity (other than the office of a parliamentarian or an intelligence agency) becomes aware of an allegation, or information, that raises a corruption issue that relates to the entity. In those circumstances, and subject to s.37(2), s.37(1)(a) requires the head of the entity to notify the Integrity Commissioner in writing as soon as practicable after receipt of the allegation or information. But if – and only if - the entity is a law enforcement entity; the head is also obliged – by s.37(1)(b) - to "identify whether the issue is a significant corruption issue." By contrast, s.37(2) requires the entity head of a public sector agency to notify the Integrity Commissioner under s.37(1) **only** if the public sector entity head reasonably suspects, having had regard to the matters specified in any CIC determination made for the purposes of "this sub-section" - that is, s.37(2) - that the offence to which the corruption issue relates has been, or is being, committed. Because the CIC has not yet been created, what those "matters" might be cannot yet be known.

If a law enforcement corruption issue is not identified as a significant corruption issue, the head of the relevant law enforcement agency, rather than the Integrity Commissioner, must investigate it unless satisfied of one or more of the matters specified in s.39(4), or unless the Commissioner decides pursuant to s.39(2) to direct otherwise: s.39(1). The "matters specified" encompass such things as that the allegation raising the corruption issue is frivolous or is the subject of court proceedings.

Section 48(1) of the Bill provides that, "as soon as practicable after a corruption issue is referred or notified to the Integrity Commissioner", he or she must make a decision under s.48(2) – that is, to take no further action, or:

- to investigate the issue; or
- if the regulated entity is not the AFP, or if the issue relates to a parliamentarian, to refer the issue to the AFP (with or without continuing involvement from the Commissioner); or
- refer the issue to the regulated entity (again, with or without continuing involvement from the Commissioner).

But such a reference may not be made to a public sector agency unless "the Integrity Commissioner is satisfied [that the public sector agency] has appropriate capabilities to investigate the issue": s.49(2).

If the issue is a public sector corruption issue, and the Commissioner does not reasonably suspect that the offence to which the issue relates has been, or is being, committed, no further action may be taken: s.48(3). It therefore follows, from the combination of s.37(2) and s.48(3), that no action will be taken in relation to a public sector corruption issue unless a reasonable suspicion about the commission of the offence in question is held not by one, but by two, high officials: the relevant public sector entity head and the Integrity Commissioner.

'Own motion' investigations

The power to commence 'own motion' investigations is a critically important power for an effective integrity commission one of the functions of which, as set out in s.25(c) is "to detect corrupt conduct in regulated entities and by parliamentarians" and another, as set out in s.25(d) is "to investigate and report on corruption issues". That importance is reflected in s.61(1), which provides that, if the Integrity Commissioner becomes aware of an allegation, or information, that raises a law enforcement corruption issue, the Commissioner may, "on the Commissioner's own initiative", deal with it.

On the other hand, the Integrity Commissioner would have strictly limited power to institute an "own motion" investigation in relation to the staff of a public sector agency. The Commissioner may on his or her own initiative decide to deal with a **public sector corruption issue** only where the Commissioner, in the course of an investigation, becomes aware of an allegation, or information, that raises such an issue (referred to in s.61(2) as "the new corruption issue") and the Commissioner reasonably suspects that the offence to which the new corruption issue relates has been, or is being, committed: s 61(3). There seems to be nothing in the Bill, at least not explicitly, which enables the Integrity Commissioner to investigate the participation of a member of the staff of a public sector agency who is implicated in the commission of a **law enforcement corruption issue**.

Public Hearings

The ability to hold public hearings is considered by the Government to be important; but only in relation to law enforcement corruption issues. Indeed, it is so important in relation to those issues that, unless the Integrity Commissioner directs that part of a hearing be held in private, all such hearings **shall** be held in public. On the other hand, "[a] hearing for the purpose of investigating a corruption issue must be held in private to the extent that the hearing is dealing with a public sector corruption issue": s.99(5).

Public Reports

The Integrity Commissioner is required by s.178(1) of the Bill to prepare a report on any investigation into a corruption issue relating to any regulated entity. By s.178(2), separate reports must be prepared about each of:

- any law enforcement corruption issues the subject of any investigation;
- any corruption issues that relate to public sector agencies, higher education providers or research bodies;
- any corruption issues that relate to the offices of parliamentarians.

Section 178(4) requires that a report on a law enforcement corruption issue under s.178(1) must set out the Commissioner's findings, the relevant evidence, proposed actions or actions taken, and any recommendations. On the other hand, a report about a public sector corruption issue – including issues relating to parliamentarians and their offices – must set out only proposed actions or actions taken, and any recommendations: s.178(5). That is, it must not include the Commissioner's findings or the evidence upon which those findings was based.

Section 178(11) provides that a report may include an opinion or finding about whether a person engaged in corrupt conduct while a staff member of a law enforcement agency. In stark contrast,

s.178(12) provides that, in every other case – again, including that of parliamentarians and their staff – a report must not include "an opinion or finding (a) about whether a particular person engaged in corrupt conduct; or (b) about corruption by, or the integrity of, a particular person." In other words, it must not include an opinion or finding about whether a "particular" person – including a parliamentarian or staffer in their office – engaged in corrupt conduct; or about corruption by, or the integrity of, such a person.

The heading of s.184 is "Report on corruption inquiry". The section confers on the Integrity Commissioner a wide discretion to exclude information from the public portion of a CIC report, and requires the exclusion from both the public and the supplementary (that is, confidential) report of "any opinion or finding (a) about whether a particular person engaged in corrupt conduct; or (b) about corruption by, or the integrity of, a particular person": s.184(8). In particular, "[a] report prepared under this section must not include any opinion, finding or recommendation about a parliamentarian, the office of a parliamentarian or a staff member of the office of a parliamentarian": s.184(9).

Not all investigations conducted, and not all reports compiled, pursuant to the provisions of the Bill, are conducted or compiled by the Integrity Commissioner. Where a regulated entity investigates a corruption issue it must cause a report on the investigations to be prepared: s.82(1). That report "must not deal with any corruption issues that relate to parliamentarians or offices of parliamentarians": s.82(2). A report following an investigation by a regulated entity "may include an opinion or finding about whether a person engaged in corrupt conduct while a staff member of a law enforcement agency": s.82(8). Otherwise, such an opinion or finding must not include either "an opinion or finding about whether a particular person engaged in corrupt conduct", or "about corruption by, or the integrity of, a particular person": s.82(9).

Part 12 of the Bill establishes the office of the Inspector-General of the CIC, the functions of which are, as specified in s.230:

- to inquire into and report upon the performance of the CIC;
- to report on the outcomes of those inquires;
- to conduct special investigations of CIC corruption issues when given Ministerial authority to do so; and
- to perform any other functions authorised by legislation.

Where an inquiry is completed under Part 12 of the Bill, the Inspector-General must produce a report: s.239(1); but "a report under this section must not include any opinion or finding:

- about whether a particular person engaged in corrupt conduct; s.239(6); or
- that is critical (either expressly or impliedly) of, or a recommendation about", a parliamentarian, or their office, or any staff members of their office: s.239(7).

And, by s.256(5), the same restriction applies to the Inspector-General's annual report under s.254, and any special report under s.255.

If a corruption issue investigated by the Integrity Commissioner is referred to the Commissioner by a Minister, the Integrity Commissioner is obliged, in the case of a referral under s.33 or s.34, to advise the Minister of the outcome of the investigation: s.182(1). If, however, the reference concerned a law enforcement corruption issue (and therefore might have come from "any person", whereas

references concerning a public sector corruption issue could only lawfully come from a restricted class of persons) the Commissioner has no such obligation – merely a discretion whether or not to advise the person making the reference of the outcome of the investigation.

However, where the corruption issue relates to the conduct of a person while a staff member of a parliamentarian's office, and information that may be prejudicial to the person's reputation is included in a report prepared under s.82 [sic] (this section (s.82) deals with investigations conducted not by the Integrity Commissioner but by a regulated agency) the Integrity Commissioner must not give to any person a copy of any part of the report which includes the prejudicial information: s 182(5).

The powers of a Royal Commission

The Integrity Commissioner may conduct an investigation "in such manner as the Integrity Commissioner thinks fit": s.72. The Bill includes extensive provisions governing the Commissioner's powers when doing so, and it is doubtless upon these that the Attorney-General bases his claim that the Commissioner will have all the powers of a Royal Commissioner. But the inability to hold public hearings in relation to public sector corruption issues, or in relation to parliamentarians and members of their staff, belies this claim. It is also subject to the qualification that the Commissioner cannot summons a person to give evidence or produce documents or things unless she or he has reasonable grounds to suspect that the evidence, or the documents, or the things (as the case may be) will be relevant to the investigation: s.100.

A FINAL OBSERVATION

Corruption in the public sector and among parliamentarians is often buried very deeply. It can 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 effectively promote 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 public, 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. The rules of evidence do not apply, nor should they. 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. The burden of proof for a criminal offence, 'beyond reasonable doubt', is a high one.

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 Government's concern, we submit, arises from a misconception that the work of NSW ICAC and the Western Australia Corruption Commission has been conducted unfairly and has unjustly tarnished reputations.

We submit that a fair analysis of the situation, for example in NSW, 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 NSW 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 NSW ICAC is the high praise given in Parliament and by public statements endorsing its work. Two Liberal Premiers, Barry O'Farrell[3] (who himself later resigned honourably) and Mike Baird,[4] praised the NSW ICAC for its work in uncovering corruption, especially among politicians and their business associates.

Yours sincerely,

The Hon Stephen Charles AO QC

The Hon Mary Gaudron QC

The Hon David Harper AM QC

The Hon Carmel McLure AC QC

The Hon Paul Stein AM QC

The Hon Anthony Whealy QC

The Hon Margaret White AO

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 kathleen@australiainstitute.org.au or 02 6130 0530.

[3] Maguire and O'Farrell (24 October 2013) *Anti-corruption agencies,* https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-54526/link/2132

[4] Clennell and Wood (2016) *ICAC: Liberals pay the price as Mike Baird apologises for political rogues,* https://amp.dailytelegraph.com.au/news/nsw/icac-liberals-pay-the-price-as-mike-baird-apologises-for-political-rogues/news-story/725a657d0e3150cad901e9b0f1acf7c5