



20 April 2016

Senator Zhenya Wang
Chair
Select Committee on the establishment of a National Integrity Commission
PO Box 6100
Parliament House
Canberra ACT 2600

By email: nic.sen@aph.gov.au

Dear Senator

ESTABLISHMENT OF A NATIONAL INTEGRITY COMMISSION

Please find attached the Law Council of Australia's submission to the Senate Select Committee on the establishment of a National Integrity Commission.

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Yours sincerely

S Stuart Clark AM
President



Establishment of a National Integrity Commission

Select Committee on the Establishment of a National Integrity Commission

20 April 2016

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Executive Summary

1. The Law Council of Australia is pleased to participate in the Select Standing Committee into the Establishment of a National Integrity Commission's (the Committee) inquiry into the Establishment of a National Integrity Commission (NIC).
2. While private members bills have previously been introduced to establish a NIC, the Committee's current inquiry seeks to examine the threshold issues of desirability, scope and the extent of the powers which should be granted to such a commission.
3. The Law Council strongly opposes corruption globally, regionally and domestically. It is committed to working with the Government and Parliament to ensure that we have appropriate systems to detect, monitor and respond to corruption risks.
4. In this regard, this submission makes four key recommendations for further steps Australia could take to strengthen anti-corruption efforts:
 - Develop – through the Council of Australian Governments (COAG) – a national strategy for addressing corruption;
 - Undertake a National Integrity System assessment of the nature, extent and impact of corruption in Australia;
 - Consider on the basis of the National Integrity System assessment whether the Australian Government should establish a broad-based federal anti-corruption agency; and
 - If a federal NIC is to be established, the scope of the Commission's powers should be based on lessons learnt from the experiences of state-based anti-corruption agencies (ACAs) regarding public hearings, gathering evidence and prosecutions, preliminary investigations, jurisdiction, coercive powers, relevant offences, penalty provisions, mandatory reporting requirements, police complaints, protected disclosure, freedom of information, oversight and resourcing.

Corruption

5. The Law Council supports effective and transparent legal and institutional measures aimed at preventing, detecting, investigating and addressing corruption at all levels of government and across various sectors. Effective measures enhance Australia's corruption resilience and build confidence in Australia's institutions.
6. Corruption is a major obstacle to democracy and the rule of law.¹ In a democratic system, the legitimacy of offices and institutions is compromised when they are misused for private advantage.² The Law Council strongly supports the rule of law as the foundation of civilised society. In particular, the Law Council's *Policy Statement on Rule of Law Principles* notes that:

... no one should be regarded as above the law and all people should be held to account for a breach of law, regardless of rank or station...³
7. Corruption can also have significant economic, social and environmental consequences⁴, concentrating wealth, increasing the gap between rich and poor,⁵ and fostering social and political instability, and even terrorism.⁶
8. Corruption is commonly understood to include bribery, embezzlement, extortion, illicit enrichment, and abuse of functions, position or influence for private gain;⁷ however, it can include many other activities.⁸
9. While there is no universally accepted definition of 'corruption',⁹ a number of organisations such as Transparency International define it as 'the abuse of entrusted power for private gain'.¹⁰ The World Bank defines a 'corrupt' practice as the 'offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party'.¹¹
10. Maladministration and misconduct may be related to corruption or indicate an increased risk of corruption.¹²

¹ Transparency International: the global coalition against corruption (2015) <<http://www.transparency.org/what-is-corruption/#costs-of-corruption>>

² Ibid, <http://www.transparency.org/whoweaare/organisation/faqs_on_corruption>

³ Law Council of Australia, *Policy Statement – Rule of Law Principles*, March 2011, 2.

⁴ Ibid.

⁵ United Nations Office on Drugs and Crime, UN Anti-Corruption Toolkit, September 2004, 17.

⁶ Ibid.

⁷ Ibid, arts 15–22. See also United Nations Office on Drugs and Crime, *United Nations Guide on Anti-Corruption Policies* (2003), 28–34.

⁸ Including, fraud or forgery; theft or misappropriation of official assets; nepotism and cronyism; acting (or failing to act) in the presence of an undisclosed conflict of interest; unauthorised disclosure of government information; blackmail; perverting the course of justice; and colluding, conspiring with or harbouring, criminals. See: Attorney-General's Department, Draft National Anti-Corruption Plan, 2013, 11. This approach is consistent with existing definitions of corruption in Commonwealth legislation which broadly define corruption as the abuse of office and perversion of the course of justice.

⁹ The United Nations Convention against Corruption to which Australia is a party does not include an agreed international definition. See *United Nations Convention against Corruption*, 9 December 2003, [2006] ATS 2, (entered into force generally on 14 December 2005). The Convention was ratified by the Australian Government on 7 December 2005 and entered into force for Australia on 6 January 2006.

¹⁰ *How Do You Define Corruption*, Transparency International <<https://www.transparency.org/what-is-corruption#define>>

¹¹ *What is Fraud and Corruption*, The World Bank <<http://www.worldbank.org/en/about/unit/integrity-vice-presidency/what-is-fraud-and-corruption>>

¹² Ibid.

Existing framework

Multi-agency approach

11. The current 'multi-agency approach' to addressing corruption at the federal level was outlined in the Attorney-General's Department's Discussion Paper, *The Commonwealth's Approach to Anti-Corruption*, in 2011.¹³ Some of the current federal bodies that set standards and oversight include the:

- Attorney-General's Department;
- Australian Public Service Commission (APSC);
- Auditor-General;
- Australian Electoral Commission;
- Office of the Australian Information Commissioner;
- Department of Finance and Deregulation; and
- Parliamentary Standards.¹⁴

12. Agencies responsible for detection and investigation include the:

- Australian Federal Police (AFP);
- AFP Fraud and Anti-Corruption Centre (FAC Centre);
- Australian Law Commission for Law Enforcement Integrity (ACLEI);¹⁵
- Australian Border Force;
- Australian Crime Commission (ACC);
- Inspector-General of Intelligence and Security;
- Office of the Commonwealth Ombudsman;
- Australian Transaction Reports and Analysis Centre; and
- Australian Taxation Office.¹⁶

13. The Office of the Commonwealth Director of Public Prosecutions is responsible for prosecution of federal corruption related offences.

14. These federal agencies are in addition to the state based ACAs, including the:

- New South Wales Independent Commission Against Corruption (NSW ICAC);
- South Australian Independent Commissioner Against Corruption (SA ICAC);
- Western Australian Corruption and Crime Commission;

¹³ Attorney-General's Department, *Discussion Paper: Australia's Approach to Anti-Corruption*, Prepared as part of the development of the National Anti-Corruption Plan, March 2012, 12; Australian Government Response to the 2011 Report of the PJC on Australian Commission for Law Enforcement Integrity (February 2012).

¹⁴ Attorney-General's Department, *Discussion Paper: Australia's Approach to Anti-Corruption*, Prepared as part of the development of the National Anti-Corruption Plan, March 2012, 12;

¹⁵ The ACLEI was established in 2006 to investigate law enforcement-related corruption issues. The agencies subject to the Integrity Commissioner's jurisdiction include the Australian Border Force; the ACC; the AFP; the CrimTrac Agency; and the Department of Immigration and Border Protection.

¹⁶ Ibid.

- Queensland Crime and Corruption Commission (CCC);
- Victorian Independent Broad-based Anti-Corruption Commission (IBAC); and
- Tasmanian Integrity Commission.

15. The Australian Capital Territory does not currently have an ACA, and the Northern Territory is in the process of establishing such a body, with an inquiry into an anti-corruption integrity and misconduct commission occurring earlier this year.¹⁷

16. Transparency International Australia has noted that definitions of official corruption differ substantially across jurisdictions, and there are growing differences in the powers available to ACAs, ranging from the NSW ICAC's powers to conduct public hearings on any matter, to the SA ICAC having no power to conduct public hearings.¹⁸

Legislative regime

17. Australia's corruption offences cover a broad range of crimes and are found in both Commonwealth and state and territory legislation.

18. At the Commonwealth level, corruption related offences may include:

- unauthorised disclosure of information (section 70 of the *Crimes Act 1914* (Cth));
- bribery, including bribery of a foreign public official (sections 141.1 and 70.2 of the *Criminal Code Act 1995* (the Criminal Code));
- perjury contrary (section 268.102 of the Criminal Code);
- unauthorised access, or modification, to restricted data (section 478.1 of the Criminal Code); and
- abuse of public office (section 142.2 of the Criminal Code).

19. Legislation may also be used in pursuing corrupt conduct, including the:

- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth);
- *Proceeds of Crime Act 2002* (Cth);
- *Public Governance, Performance and Accountability Act 2013* (Cth);
- *Corporations Act 2001* (Cth);
- *Law Enforcement Integrity Commissioner Act 2006* (Cth);
- *Australian Border Force Act 2015* (Cth); and
- *Australian Federal Police Act 1979* (Cth).

20. Commonwealth legislative frameworks which may assist in preventing corrupt conduct or enable reporting of corrupt conduct also include:

¹⁷ Northern Territory Government, *Anti-Corruption Integrity and Misconduct Commission Inquiry*.
<<http://static.fairfaxrural.com.au/classifiedsimages/full/17292148.pdf>>

¹⁸ Transparency International Australia, *Anti-Corruption Agencies in Australia*, (January 2016)

- Australia's administrative law system, which can protect against abuse of power by providing for merits and judicial review of government decisions and promoting transparency in government processes.¹⁹
- Whistle-blower protection legislation, which may allow disclosures in some cases.²⁰

International cooperation

21. International cooperation is also essential to ensure that Australia effectively combats corruption and foreign bribery. International cooperation occurs through a variety of agencies including the Department of Foreign Affairs and Trade, the International Crime Cooperation Central Authority and the Attorney-General's Department Portfolio agencies. In addition, Australia is actively involved in a range of multilateral anti-corruption forums, such as the G20 Anti-Corruption Working Group.
22. The seriousness of the negative impacts of corruption has been recognised by the General Assembly of the United Nations, in its adoption of the *United Nations Convention Against Corruption (UNCAC)* on 31 October 2003. The UNCAC requires that Convention parties – including Australia – ensure the existence of independent anti-corruption bodies that implement measures to prevent and combat corruption, and, in particular, 'a body, bodies or persons specialised in combating corruption through law enforcement' that are independent and free from undue influence.²¹
23. The Organisation for Economic Co-operation and Development (OECD), of which Australia is a member, is an international organisation which aims to promote policies that will improve the economic and social well-being of people around the world.²² The OECD Anti-Bribery Convention:

*...establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the 'supply side' of the bribery transaction.*²³

The Problem

24. Australia's ranking in the Transparency International's Corruption Perceptions Index has declined from the seventh least corrupt country in 2012 to currently the thirteenth least corrupt.²⁴ The ACC suggests that this may be as a result of a failure to deal with major corruption incidents transparently and also a deterioration of public sector standards. There is also a concern that successive Australian governments have

¹⁹ The *Judiciary Act 1903*, the *Administrative Appeals Tribunal Act 1975*, the *Administrative Decisions (Judicial Review) Act 1977* and the *Legislative Instruments Act 2003*.

²⁰ *Public Interest Disclosure Act 2013* (Cth); *Corporations Act 2001* (Cth) Pt 9.4AAA; *Banking Act 1959* (Cth) Div 1; *Insurance Act 1973* (Cth) Div 4; *Life Insurance Act 1995* (Cth) Div 5; *Superannuation Industry (Supervision) Act 1993* (Cth) Div 1.

²¹ See *United Nations Convention against Corruption*, 9 December 2003, [2006] ATS 2, (entered into force generally on 14 December 2005), arts 6, 36.

²² The Organisation for Economic Co-operation and Development (2016) <<http://www.oecd.org/about/>>

²³ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

²⁴ <http://transparency.org.au/index.php/media-release/australias-international-corruption-reputation-continues-to-tumble/>

failed to properly address foreign bribery,²⁵ a problem that the current Australian Government has sought to remedy with the introduction of false accounting provisions.

25. The ACC identified corruption by public officials as a 'key enabler' for organised crime in its *Organised Crime in Australia 2015 Report* (the ACC report).²⁶ The ACC estimates that serious and organised crime costs approximately \$15 billion yearly.²⁷
26. The ACC report observes that corruption can occur at junior levels, 'through infiltration of managerial, senior spheres, to influencing heads of law enforcement agencies and finally ending in the capture of state policies and structures'.²⁸ The ACC report also indicates that 'anti-corruption agencies have noted a concern that, as the sophistication of organised crime increases, corrupt conduct is likely to become less susceptible to discovery than was previously the case'.²⁹
27. Various reports have identified corrupt practices at different levels of government and specific industries. For example:
- the 2006 Cole Inquiry into the Oil-for-Food Program;
 - alleged rorting of Commonwealth-controlled programs such as the 2008-2010 home insulation scheme;
 - the July 2013 findings of the NSW ICAC that former NSW government ministers engaged in corrupt conduct in relation to mining exploration licences;
 - foreign bribery charges against Reserve Bank of Australia subsidiaries;
 - corruption allegations against Leighton Holdings;
 - corruption allegations of former or current Commonwealth-owned or controlled entities against the Australian Wheat Board Limited, Securrency and Note Printing Australia;
 - recurring questions regarding adequate transparency and oversight of parliamentary entitlements, claims and political donations;
 - corruption allegations against the building and construction industry (for example, in the context of debates about the Australian Building and Construction Commission legislation³⁰); and
 - potential concerns about real owners of companies or beneficiaries of assets (e.g. offshore shell companies in Panama).
28. There appears to be a widely-accepted view that:

... corruption risks are only likely to intensify for the foreseeable future in the modern globalised economy, given ever-increasing competitive pressures on business, the sophistication of modern organised criminal and security threats,

²⁵ OECD Working Group on Bribery, *Phase 3 Report on Implementing The OECD Anti-Bribery Convention In Australia*, October 2012, 5. The report noted that the Working Group held serious concerns that overall enforcement of the foreign bribery offence had been extremely low and that at the time of the report only one foreign bribery case had led to prosecution.

²⁶ Australian Crime Commission, *Organised Crime in Australia*, 2015, 11.

²⁷ Law, Crime and Community Safety Council, *National Organised Crime Response Plan 2015-2018*, 2.

²⁸ Australian Crime Commission *Organised Crime in Australia*, 2015, 28.

²⁹ *Ibid*, 29.

³⁰ The Building and Construction Industry (Improving Productivity) Bill 2013 [No.2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No.2].

*and the intensity of politics and public administration in the age of the new media, public expectations and financial volatility.*³¹

29. There is also confusion about:

- variable, inconsistent or missing legal definitions of official corruption;
- whether State-based ACAs' efforts are properly prioritised, proactive and coordinated with other agencies;
- insufficient confidence that action is being taken to deal properly with individuals who engage in or benefit from corrupt conduct that is uncovered;
- whether ACAs have the right powers, sufficient resources and necessary independence from government;
- adequacy of accountability, oversight and performance assurance arrangements; and
- gaps in arrangements at the Australian federal government level.³²

30. Much of the total federal public sector does not fall within the jurisdiction of the APSC.³³ Not all Commonwealth agencies are participating agencies in the FAC Centre. The capability of the FAC Centre to prevent, detect and investigate corruption at the most senior levels of public office and at the Ministerial and Parliamentary levels is also unclear.

31. Further, while the AFP may investigate alleged criminal conduct by Commonwealth parliamentarians, there may be insufficient mechanisms supporting federal parliamentary integrity.

Time for a National Approach

32. The Law Council agrees with the assessment of Transparency International,³⁴ that given the weaknesses and concerns of the current intermittent and seemingly uncoordinated approach to combating corruption, it is time for a focused national approach to corruption in Australia.

33. Parliamentary committees have previously called for a 'Commonwealth integrity commission of general jurisdiction'³⁵ and a review of Australia's integrity system 'with particular examination of the merits of establishing a Commonwealth integrity commission' with oversight of all Commonwealth agencies'.³⁶

34. In 2011-2012, the former Commonwealth Government undertook a consultation process to develop a National Anti-Corruption Plan, however, this was never finalised. Further, the Greens have introduced a National Integrity Commission Bill into the

³¹ Transparency International 'A Ten-Point Integrity Plan for the Australian Government', Submission by Transparency International Australia on the Proposed National Anti-Corruption Plan, May 2012, 3.

³² Transparency International Anti-Corruption Agencies in Australia Position Paper #3, January 2016, 1.

³³ The PSC oversees the conduct of the Australian Public Service and monitors compliance with the APS Values and Code of Conduct, which includes anti-corruption measures.

³⁴ Transparency International, *Anti-Corruption Agencies in Australia*, Position Paper #3, January 2016, 2.

³⁵ Senate Legal and Constitutional Affairs Legislation Committee, Report into Provisions of Law Enforcement Integrity Commissioner Bill 2006 [and related measures], May 2006, 28.

³⁶ Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, Report of the Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006, 2011, Recommendation 10.

Commonwealth Parliament on three occasions, which have lapsed without being debated.

35. A national anti-corruption strategy would bring greater coherence to tackling bribery and corruption. It would also reflect the importance the Government places on tackling the threat to Australia from corruption, both domestically and internationally. The merits of establishing a federal NIC should be considered as part of this broader strategy.

Australian Anti-Corruption Strategy

36. Benefits of developing a national strategy include:

- articulation of the extent and nature corruption risks facing Australia;
- directing Australia's domestic and global work to combat corruption;
- demonstrating Australia's commitment to address corruption;
- providing a comprehensive and robust framework which closes the gaps in the integrity and anti-corruption system;
- ensuring consistency, coordination and clear roles for relevant Australian agencies and ACAs; and
- providing transparency.

37. Any strategy should be developed in close consultation with relevant national and international stakeholders with expertise in corruption matters. The UK National Anti-Corruption Plan may also provide a useful starting point in developing a strategy.

38. Elements of the strategy should include:

- an agreed position of federal, state and territory governments on an appropriate framework for addressing corruption at all levels of government and across various sectors, including the appropriateness of a federal ACA/NIC;
- an explanation of Australia's vision, goals and guiding principles on corruption – these could be developed on the basis of, for example, best practice principles developed by Transparency International³⁷ and international corruption obligations;
- an agreed position of federal, state and territory governments on appropriate legal definitions of corruption;
- an agreed position of federal, state and territory governments on appropriate powers and accountabilities for ACAs, including the scope of investigatory powers, frameworks for corruption prevention, coordination with prosecutions, oversight arrangements, and effective strategies to ensure the independence of ACAs;³⁸
- a robust monitoring regime to assess effectiveness;

³⁷ Sofia Wickberg, *Anti-Corruption Helpdesk: Best Practices for Anti-Corruption Commissions*, Transparency International (2013) <http://www.transparency.org/files/content/corruptionqas/Best_practices_for_anti-corruption_commissions_2.pdf>

³⁸ Transparency International, *Anti-Corruption Agencies in Australia*, Position Paper #3, January 2016, 3.

- international bilateral and regional initiatives,³⁹ including United Nations initiatives;⁴⁰
- development of a communications strategy to convey clear consistent messaging and employ a range of communications methods; and
- development of formalised education and prevention structures.

Recommendation:

- **Develop – through COAG – a national strategy for addressing corruption.**

National Integrity System assessment

39. In 2005, Australia conducted a first exploratory National Integrity System (NIS) assessment as a comprehensive means of assessing a country's anti-corruption efficacy;⁴¹ however, it is yet to undertake a NIS using the more recent Transparency International methodology.⁴²

40. NIS assessments are important as they can find gaps in integrity systems, ensure efficient and accountable integrity agencies, and support more effective prevention and remediation of corruption internationally.⁴³

41. NIS assessments can:

- a) compare similar integrity-related institutions in different jurisdictions;
- b) identify the ways in which the elements of the NIS interrelate, as well as any gaps or overlaps between those elements;
- c) assess the strengths and weaknesses of the present Australian integrity systems and recommend improvements;
- d) provide a benchmark for comparison between jurisdictions and against which changes in the effectiveness of the integrity system can be measured;
- e) provide a basis for action by relevant Australian governmental and non-governmental agencies and organisations; and
- f) provide a case study for other countries, both developed and developing.⁴⁴

³⁹ For example the OECD Anti-Corruption Initiative for Asia-Pacific.

⁴⁰ For example, *United Nations Convention against Corruption*, 9 December 2003, [2006] ATS 2, (entered into force generally on 14 December 2005); United Nations Office on Drugs and Crime, *United Nations Guide on Anti-Corruption Policies* (2003)

⁴¹ *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems, Final Report*, National Integrity Systems Assessment, December 2005 <http://transparency.org.au/wp-content/uploads/2012/08/nisa_final.pdf>

⁴² Transparency International *Anti-Corruption Agencies in Australia* Position Paper #3, January 2016, 2.

⁴³ *Ibid*, 3.

⁴⁴ *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems, Final Report*, National Integrity Systems Assessment, December 2005 <http://transparency.org.au/wp-content/uploads/2012/08/nisa_final.pdf>

Recommendation:

- **Undertake a National Integrity System assessment of the nature, extent and impact of corruption in Australia.**

Federal anti-corruption agency

42. On the basis of results from the suggested independent commissions of inquiry into corruption in Australia, the Parliament and Government should consider whether the investigation of federal corruption and Australia's integrity framework can be more effective through the establishment of a federal anti-corruption agency. Relevant factors in this assessment may include:

- gaps in existing investigative Commonwealth anti-corruption oversight, particularly at the Ministerial, Parliamentary levels and in capturing all federal government agencies;
- public sector and federal Ministerial and Parliamentary risk profiles;
- consequences of corruption at all levels of the federal government;
- potential for systemic issues addressing corruption to not be identified across diverse multi-agency activities and at all levels of government in the absence of a single anti-corruption agency;
- consistency of approach in addressing corruption with State jurisdictions that have implemented anti-corruption commissions;
- the need to ensure adequate funding to resource a federal anti-corruption agency to develop effective prevention and investigatory methodologies; and
- coordination of jurisdictional scope to avoid potential conflict and unnecessary duplication with existing agencies.⁴⁵

43. Transparency International has recommended the Australian Government establish a broad-based federal anti-corruption agency, as one element of an enhanced multi-agency strategy to ensure:

*... a comprehensive approach to proven and emergent corruption risks beyond the criminal investigation system, ensure effective anti-corruption oversight across the entire federal public sector, and support stronger parliamentary integrity.*⁴⁶

44. Alternatively, Professor Adam Graycar, Director, Transnational Anti-Corruption Centre, supports the establishment of an 'anti-corruption council'. Professor Graycar has noted that such a council could be chaired externally to Government, report to Parliament, and comprise of representatives from non-government organisations, academics, and government. Professor Graycar also noted that such a council would not have an investigatory role, instead receiving referrals from the public and directing them to the appropriate investigatory agency.

⁴⁵ Mark Coultan, 'Federal ICAC would not work, anti-corruption expert warns', *The Australian* (online) 23 February 2016 <<http://www.theaustralian.com.au/news/nation/federal-icac-would-not-work-anticorruption-expert-warns/news-story/b70f64282a06af6beed413446a0ef451>>

⁴⁶ Ibid.

45. The merits of such a council as opposed to a federal ACA should be considered on the basis of the independent studies commissioned.

Recommendation:

- **Consider on the basis of the National Integrity System assessment whether the Australian Government should establish a broad-based federal anti-corruption agency or council.**

Anti-Corruption Agency Powers

46. This section considers a range of powers of state based ACAs and the lessons learned from their operation to date, including:

- public hearings;
- gathering evidence and prosecutions;
- preliminary investigations;
- jurisdiction;
- mandatory reporting requirements;
- protected disclosure;
- coercive powers;
- penalty provisions;
- freedom of information;
- oversight; and
- resourcing.

Public Hearings

47. One issue to be assessed in deciding whether to establish a standing commission into corruption is whether to empower the commission to conduct public hearings. This decision is not uncontroversial. The NSW ICAC has the power to conduct public hearings, as does Victoria's IBAC; however, not all Australian corruption commissions are so empowered. For example, South Australia's ICAC conducts all examinations in private.

48. The NSW ICAC must consider various factors in determining whether or not it is in the public interest to conduct a public inquiry, including:

- the benefit of exposing corrupt conduct to the public;
- the seriousness of the allegation or complaint being investigated;
- any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry); and

- whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.⁴⁷
49. Key advantages associated with the conduct of public hearings include transparency, instilling public confidence in dealing with corruption, and deterrence to engaging in corruption.
50. Conversely, public hearings can significantly impact on the rights of individual persons appearing before the ICAC. Appearances before a corruption inquiry may generate substantial media interest, and taint a witness's reputation. These issues might be compounded by factors including:
- usually only part of an investigation is conducted in public, which may distort the public's understanding of events;
 - persons of interest ordinarily have no right to subpoena witnesses or documents;
 - members of the public may fail to appreciate the distinction between a commission of inquiry, often presided over by a former judge, and a court; and
 - inquiries often involve multiple persons of interest such that decisions whether to conduct hearings in public are made globally and not with the interests of an individual in mind.
51. If the implementation of a NIC includes the power to hold public hearings, it is important that there be an appropriate balance between transparency and the abrogation of rights and reputation of individuals appearing before such a Commission.
52. The Law Council considers that the approach in Queensland which enables the CCC to conduct private hearings should be the default model adopted in proceedings before a federal ACA.

Gathering Evidence & Prosecutions

53. If the focus of a NIC is investigative, it follows that close consideration should be given to the manner in which material is generated, and shared with other agencies, to improve the prospects of that material being used to support a criminal prosecution.
54. For example, in NSW, section 14 of *ICAC Act 1988* (NSW) provides that a function of the ICAC should be the gathering and assembling of evidence that may be admissible in the prosecution of a person for a criminal offence.
55. It is important to the protection and enforcement of the principles of an open democracy and to the promotion of the aim of the ICAC in preventing breaches of public trust in the administration of public office that the ICAC be enabled to carry out its functions from time to time without some of the rigours and restrictions required by principles that operate in the criminal law jurisdiction and to carry them out thoroughly and expeditiously.
56. Issues such as powers of compulsion, and any effect the exercise of those powers might have on the later admissibility of any evidence obtained through that process or through other investigative means, are important considerations.

⁴⁷ *Independent Commission Against Corruption Act 1988* (NSW) s31.

57. However, in accordance with section 14 of the *ICAC Act 1988* (NSW), consideration should be given where possible to obtaining evidence in an admissible form. Investigators should be conscious of the prospect of a criminal prosecution and not only be alert to identifying, gathering and forwarding evidence that may support prosecution in due course, but also to not acting in a way that will prejudice any potential prosecution.
58. Careful consideration will need to be given to the difficulties associated with a prosecution arising from an investigation involving compulsory processes, for example of the kind identified in *Lee v The Queen*; *Lee v The Queen* [2014] HCA 20 (21 May 2014) and *QAAB v Australian Crime Commission* [2014] FCA 747.
59. If it is contemplated that the ICAC has a role in preparing (or even prosecuting) criminal matters, consideration needs to be given to the standard of proof that is required in criminal matters, prosecutorial guidelines and practice and the ICAC's ability to garner evidence in a form which would be admissible in any criminal trial.
60. Currently in NSW the ICAC may act upon any material that it regards as reliable, which may include transcripts of interviews or recordings of conversations replete with inadmissible and irrelevant material. The ICAC material does not need to be in admissible form for its purposes, given the mandate that it has to enquire into corruption without the restrictions imposed upon it by matters of evidence law.
61. However, if the ICAC is to prosecute matters itself or to refer matters to the DPP with a recommendation for prosecution, the material garnered and collated should be analysed to identify what is admissible, sufficient and reliable.
62. In 2014 the NSW Bar Association made a submission to the New South Wales Parliamentary Committee on the ICAC providing a number of suggestions, including the introduction of protocols for co-operation between the ICAC, the NSW Police Force and the Office of the Director of Public Prosecutions so that evidence can be gathered in a way such that it can be assessed and preserved in admissible form during the ICAC process, without undermining the power that the ICAC already has by way of its compulsory evidence taking process. Such a recommendation could also be applied to a NIC, if established.
63. Further, consideration should be given to an obligation to permit or produce exculpatory material rather than a federal ACA suppressing it. This would potentially produce a more procedurally fair outcome.
64. The NSW Bar Association's submission also recommended the introduction of provisions to ensure that all conduct captured by the *ICAC Act 1988* (NSW) could be prosecuted as a criminal offence, and to allow for court ordered accounting of profits; compensation to the State or to any innocent third party; and the unwinding of any agreements obtained by corrupt conduct.
65. It is important that any information-sharing protocol specify appropriate safeguards, which could be developed in consultation with the Privacy Commissioner.

Preliminary Investigation Powers

66. A preliminary investigations power would allow a NIC to test information, gather further information and determine whether to dismiss or refer a complaint at an early stage.⁴⁸

⁴⁸ The 2015 Bill introduces a preliminary investigations power along with limited coercive powers to summons witnesses to produce documents or give evidence to IBAC.

Jurisdiction

67. In NSW, the ICAC can investigate the following NSW public sector organisations:

- Government departments and statutory authorities;
- public schools, colleges and universities;
- public hospitals and area health services;
- local councils;
- NSW Parliament, including politicians; and
- NSW judiciary.

68. In 2015, the ICAC's jurisdiction was expanded to include allegations of breaches of certain electoral and lobbying laws. Consideration should be given to the scope of jurisdiction for a NIC, and whether it should be similar in scope to the NSW ICAC, including both politicians and public servants across all areas of the public sector.

69. In Victoria, the Law Institute of Victoria has noted that, there are high jurisdictional thresholds currently present in the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act). The main barriers include overly narrow definitions of 'relevant offence' and 'corrupt conduct' and the threshold issues of what constitutes 'serious' corrupt conduct and what standard IBAC needs to be satisfied of in order to begin an investigation.

70. The IBAC Commissioner, Stephen O'Byran SC, noted in the *Special Report following IBAC's first year of being fully operational* that these threshold issues have 'possibly undermined IBAC's ability to perform and achieve its principal objects and functions'.⁴⁹

71. While it is important to provide boundaries to an investigatory body with coercive powers, it is also crucial to enable those bodies to gather enough information to allow them to make informed decisions about the cases and complaints they do investigate, and not to impose overly technical requirements at the threshold stage. Systemic issues may not be prioritised on a case by case basis, but when seen as a whole may raise broader concerns about a particular group of people or agency.

72. The Victorian Parliamentary IBAC Committee recently released its report: *Strengthening Victoria's key anti-corruption agencies?*.⁵⁰ In the report the Committee notes that among all integrity bodies there is a tension arising between their substantial investigative powers and the high level of independence they require to be effective in targeting corruption, which is often difficult to detect.⁵¹ In Victoria, IBAC's independence has been unduly restricted by the high legal thresholds it faces in beginning an investigation, which effectively limits the range of issues and complaints it can investigate.

73. One of the difficulties facing IBAC under the current IBAC Act is the requirement for IBAC to be 'reasonably satisfied' that conduct constitutes 'serious corrupt conduct'

⁴⁹ Independent Broad-based Anti-corruption Commission, *Special report following IBAC's first year of being fully operational* (April 2014), <http://www.ibac.vic.gov.au/docs/default-source/special-reports/special_report_-_first_year_operational.pdf?sfvrsn=4> 25.

⁵⁰ Parliament of Victorian, Independent Broad-based Anti-Corruption Commission Committee, *Strengthening Victoria's key anti-corruption agencies?* (February 2016) <http://www.parliament.vic.gov.au/images/stories/committees/IBACC/IBACC_58-01_Report_WEB.pdf>.

⁵¹ *Ibid*, 4.

before beginning an investigation (s 60(2)). 'Serious' is not defined in the Act, while 'corrupt conduct' has a lengthy definition and is required to be conduct 'that would, If the facts were found proved beyond reasonable doubt at a trial, constitute a relevant offence'. 'Relevant offence' also has a limited definition under section 4 of the IBAC Act and does not currently extend to all indictable common law offences such as misconduct in public office.

74. The Law Institute of Victoria has noted that, together, these threshold requirements can make it difficult for IBAC to begin an investigation and this may effectively limit the independence of IBAC to identify areas and complaints of concern. Given it may take IBAC some time to determine whether corrupt conduct is 'serious' or widespread, requiring IBAC to make this decision before it can begin investigating significantly narrows the range of conduct that IBAC can investigate. This could lead to some conduct, that may (with further investigation) be serious, not being investigated because the full extent of the conduct was not apparent at the threshold stage.
75. The Law Institute of Victoria has also noted that the 2015 IBAC Bill could address a number of concerns relating to the high threshold test. In particular, it would:
- remove the requirement that IBAC investigate only 'serious' corrupt conduct; and
 - lower the threshold from 'reasonably satisfied' to 'reasonable suspicion' that corrupt conduct exists before IBAC can commence an investigation.
76. The Bill could also address one of the recommendations arising out of the NSW Independent Panel's *Review of the Jurisdiction of the Independent Commission Against Corruption*,⁵² and provide IBAC with the power to investigate conduct involving fraud on a public official or conspiracy to defraud a public official. This amendment could ensure that corrupt conduct that may have important consequences for public administration, but may not involve any wrong-doing on the part of public officials, is able to be investigated by IBAC.
77. In addition, the Bill would extend the objects of IBAC to investigate corrupt conduct that is 'serious or systemic' and require IBAC to prioritise the investigation of serious or systemic corrupt conduct. Moving the 'serious' test out of the threshold requirements for investigations and into IBAC's overall priorities and objects of the Act could provide for greater flexibility for IBAC to investigate corrupt conduct where necessary (perhaps before it may be defined as 'serious'), while also providing an overriding requirement to focus its attentions on more serious or systemic conduct.
78. However, it is important that the threshold is not set too low as to allow unnecessary expenditure of resources to investigate cases involving a broad range of inappropriate matters. In the Law Council's view, jurisdiction of a possible federal ACA should be limited to serious corruption cases to avoid situations such as in *Independent Commission Against Corruption v Margaret Cuneen & Ors* [215] HCA 14 (Cuneen).

Coercive Powers

79. The NSW ICAC has extraordinary powers that override a number of fundamental rights, such as the privilege against self-incrimination and the right to silence. It is important to place reasonable limits on the circumstances in which such powers may

⁵² Independent Panel, *Review of the Jurisdiction of the Independent Commission Against Corruption*, Report (30 July 2015)
<http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0003/173235/Independent_Panel_Review_of_the_Jurisdiction_of_the_Independent_Commission_Against_Corruption_Report.pdf> Recommendation 1, xi.

be exercised to protect the community against unwarranted intrusions on their civil liberties.

Relevant offences

80. There is a broader question of the extent of conduct that a potential new NIC should be able to investigate. As the Victorian Parliamentary IBAC Committee notes, this is a “difficult and complicated question - one that is yet to be resolved in any anti-corruption agency in Australia”.⁵³

Penalty Provisions

81. Generally, the NSW ICAC’s powers include making findings of corrupt conduct against people investigated, and making recommendations about appropriate action. For example, the ICAC could recommend that consideration be given to the taking of disciplinary or dismissal action, or that the advice of the DPP be sought on the prosecution of persons for criminal offences.

82. Very few ICAC findings of corruption have led to criminal convictions. In the event that a NIC is established, consideration should be given to including a power to impose civil penalties or a ‘statutory corruption in office’ offence.

Mandatory Reporting Requirements

83. Provisions that would require all public sector heads to notify an ACA of any matter that they suspect on reasonable grounds involves corrupt conduct would assist in ensuring a coordinated and cohesive approach to targeting corrupt conduct.

Police complaints

84. In Victoria, one of the IBAC’s functions is to receive complaints of police misconduct and either investigate, dismiss or refer them to Victoria Police for investigation. However, a large number of complaints are currently being referred to Victoria Police rather than being investigated by IBAC.⁵⁴

85. There should be an ability for complaints regarding police misconduct to be investigated independently from police and the relevant ACA should be provided with adequate resourcing to ensure that this occurs.

86. Article 2, paragraph 3 of the *International Covenant on Civil and Political Rights* requires State parties to ‘investigate allegations of [Covenant] violations promptly, thoroughly and effectively through independent and impartial bodies’.⁵⁵ In the United Nations Human Rights Committee’s decision on *Horvath v Australia*⁵⁶ the Committee found that Australia has an obligation to ensure that police perpetrators of human rights violations are adequately disciplined through an independent, effective and impartial complaints body. Complaints of police misconduct may raise human rights

⁵³ Parliament of Victorian, Independent Broad-based Anti-Corruption Commission Committee, Strengthening Victoria’s key anti-corruption agencies? (February 2016) http://www.parliament.vic.gov.au/images/stories/committees/IBACC/IBACC_58-01_Report_WEB.pdf 64.

⁵⁴ Law Institute of Victoria et al, Submission to Premier et al, *RE: United Nations Human Rights Committee Communication No. 1885/2009 (Horvath v Australia)*, 24 July 2014 < [http://www.liv.asn.au/getattachment/c3dfb9bf-85b9-494c-b734-0219a39e046b/UN-Human-Rights-Committee-Communication-\(Horvath-v.aspx\)](http://www.liv.asn.au/getattachment/c3dfb9bf-85b9-494c-b734-0219a39e046b/UN-Human-Rights-Committee-Communication-(Horvath-v.aspx))>.

⁵⁵ General Comment No.31, *The Nature of the General Legal Obligation imposed on State Parties to the Covenant*, Paragraph 15.

⁵⁶ United National Human Rights Committee, CCPR/C/110/D/1885/2009, Communication No. 1885/2009.

concerns and should be dealt with by an independent body, both at state and federal level.

Protected Disclosures

87. There should be consistency and integrity in any NIC scheme dealing with protected disclosures to ensure public confidence in the scheme.⁵⁷

Freedom of Information

88. In Victoria, the broad exemption to the *Freedom of Information Act 1982* (Vic) in section 194 of the IBAC Act has had unintended consequences for Victorians' access to freedom of information documents relating to police complaints.⁵⁸

89. For example, a complaint made to IBAC and then referred to Victoria Police for investigation would be exempt from the FOI Act by the operation of section 194. However, the same complaint made directly to Victoria Police would be subject to the FOI Act. Despite undergoing the same investigation, the effect of section 194 means that the ability of a complainant to access the documents depends on whether the complaint was originally made to IBAC or Victoria Police.

90. While this issue is specific to the Victorian IBAC legislation, it highlights the importance of ensuring that any freedom of information exemptions in a federal Bill should be carefully considered.

Oversight

91. It is important that there is rigorous oversight of decisions made by a federal NIC/ACA, if established.

92. In NSW, the Parliamentary Committee on the Independent Commission Against Corruption reviews the ICAC's performance, examines the ICAC's annual and other reports, and reports to Parliament on matters relating to its functions. The Committee does not have the power to investigate particular conduct, or to reconsider the ICAC's decisions, findings or recommendations about particular complaints or investigations.

93. There is no merits review of an ICAC finding; however, judicial review is available to anyone denied procedural fairness.

94. However, the *Cuneen* decision highlights the importance of strong oversight mechanisms to ensure that ACAs do not operate beyond the scope of their jurisdiction.

Resourcing

95. Matters dealt with by ACA's are, by their nature, complex and time-consuming. Vast amounts of materials typically need to be analysed with a view to determining what charges may be available and against whom. Often additional investigations may be identified, to be conducted by police, forensic accountants and other experts.

⁵⁷ Currently, protected disclosures about members of Parliament in Victoria are only referred to IBAC at the discretion of the Presiding Officer of Parliament, in contrast with all other entities.

⁵⁸ For further details see: Law Institute of Victoria, Submission to Attorney-General, Special Minister of State and Minister for Police, *Access to Police Misconduct Complaints*, 2 November 2015 <<http://www.liv.asn.au/getattachment/9144cd37-5206-423f-92da-3c4159416ebf/Access-to-police-misconduct-complaints.aspx>>.

96. The DPP must deal with such referrals against an existing workload for which resources are already inadequate. Given the potentially high profile of any such matters, it is particularly important that any matters prosecuted are done so efficiently and effectively.
97. So far as obligations of disclosure are concerned, additional resources would be required to ensure that while the prosecutor of any criminal proceedings was not aware of inadmissible material obtained under compulsion through the ACA process, there was an officer within the prosecution service who was cognisant of all material, so as to fulfil any disclosure obligations to the accused person.

Recommendation:

- **If a federal NIC is to be established, the scope of the Commission's powers should be based on lessons learned from the experiences of state-based ACAs regarding public hearings, gathering evidence and prosecutions, preliminary investigations, jurisdiction, mandatory reporting requirements, protected disclosure, coercive powers, penalty provisions, freedom of information, oversight and resourcing.**

Conclusion

98. Allegations of corruption and corrupt practices affect the integrity of Australia's institutions and international reputation. There is currently a patchwork approach to dealing with corruption across Australia's jurisdictions whereby some states and territories have ACAs and others do not. There is also an inconsistent approach for addressing corruption at the state and federal level.
99. This submission has therefore recommended that a national strategy for addressing corruption is needed, which should include consideration of a federal anti-corruption agency or council. A national integrity system assessment of the nature, extent and impact of corruption in Australia is also needed.
100. If a federal NIC is to be established, the scope of the Commission's powers should be based on lessons learnt from the experiences of state-based anti-corruption agencies regarding public hearings, gathering evidence and prosecutions, preliminary investigations, jurisdiction, coercive powers, relevant offences, penalty provisions, mandatory reporting requirements, police complaints, protected disclosure, freedom of information, oversight and resourcing.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.