New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

SENATE SELECT COMMITTEE ON A NATIONAL INTEGRITY COMMISSION

NATIONAL INTEGRITY COMMISSION INQUIRY

27TH April 2017

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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SUBMISSION ON NATIONAL INTEGRITY COMMISSION

The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to contribute to this inquiry into the establishment of a National Integrity Commission. NSWCCL has not contributed to any of the previous inquiries relating to a national anti-corruption strategy and whether or not the establishment of a national integrity agency is an appropriate response. We have however maintained a close interest in the debates and noted the growing pressure for the Australian Government to take more effective action against corruption at the national level.

1. ANTI-CORRUPTION AGENCIES AND CIVIL LIBERTIES

As a civil liberties organization NSWCCL has opposed anti-corruption agencies sitting outside the established justice system and wielding extraordinary coercive and covert powers. We have done so on the principled grounds that they infringed established rights and liberties in an unwarranted manner, caused unfair reputational damage and undermined the rule of law. As such we have regarded these bodies as dangerous, unnecessary and inappropriate in a democratic society.

In recent decades it has become clear that increasingly complex forms of corruption pose a serious and growing threat to the public good in Australia: by undermining the integrity of our political system, distorting the policy making process, diverting resources from public good objectives and generally undermining public trust in our political class, governing institutions and public administration.

If not more effectively checked, corruption poses a threat to our democratic values and processes – including individual rights and liberties. We note with concern the growing disillusionment with democracy in Australia and elsewhere. The perceived lack of integrity within our political systems is a significant contributing factor to this trend.

NSWCCL remains very cautious about the granting of extraordinary covert and coercive powers to state agencies - including anti- corruption bodies. However, from a civil liberties perspective we consider the balance between greater public good and greater public harm has shifted. In this evolving context, if the public interest is to be protected against corruption, NSWCCL acknowledges that the establishment of anti-corruption agencies equipped with extraordinary investigative powers- with proper constraints and safeguards- is necessary and proportionate.

NSWCCL has in recent years generally supported the NSW ICAC for its successful anti-corruption work – notably its immensely important exposure of corruption to the public view.

On balance, ICAC has been force for good in NSW. It enjoys strong community support which has provided a restraint (albeit not totally effective) on politicians from undermining ICAC for personal/party political reasons or in response to self-interested pressure from others.

It is from this public good perspective that NSWCCL supports the establishment of a broad based National Integrity Commission (NIC) as necessary for stronger and more effective anti-corruption action at the national level.

NSWCCL has confined its comments to matters which are of direct civil liberties concern and around which there is ongoing debate as to the appropriate course of action. We have a view about the jurisdiction of the NIC –including the definition of 'corruption' within its ambit and keen interest in finding optimal resolution –from a civil liberties perspective -of the inevitable tensions between the rights of individuals and the public good in exposing and deterring corruption in public administration.

2. CASE FOR A NATIONAL INTEGRITY COMMISSION

NSWCCL considers there to be an indisputable case for the establishment of a broad based anti-corruption body at the federal level because of the frequently documented gaps and inadequacies in the current multi-agency approach and its failure to arrest the dangerous decline of public trust and confidence in the integrity of Government and public administration.

Level of corruption

While there is a degree of subjectivity in interpreting the available data on corruption in Australia, clearly we do not rank among the worst countries. Nonetheless, what we do know about corruption and misconduct within, and related to, public administration at a national level is of concern. It is also a reasonable assumption that a great deal of corruption in Australia is not detected by existing agencies or procedures and is therefore not visible to the public.

There are solid grounds for arguing that the level of corruption relating to public administration is on the increase and becoming increasingly difficult to detect or expose to public view.

Transparency International data on perceived levels of worldwide corruption has Australia slipping from 6thposition in 2012 to 13th in 2013[1] which, while not a dramatic decline is a useful warning indicator that all may not be well.

The Australian Public Service Commission similarly reports a low level of detected and perceived corruption/misconduct within the public service.

The undemocratic trend for extreme secrecy provisions across public administration poses an obvious and serious barrier to the detection and exposure of corruption and misconduct. This is particularly so when severe penalties for revealing information – including imprisonment – are attached. The current most alarming example is the extreme secrecy which has been imposed by policy and legislation within the Immigration and Border Protection Portfolio.

The relevance of public service protocols, regulations and laws is declining with the increased privatization of public services and the transformation of major public service agencies into state corporations. In these contexts transparency is further undermined by the overuse of 'commercial in confidence' barriers to public accountability for allocation of major public resources.

Collectively these developments are seriously weakening the capacity of journalists, academics, think tanks and others to expose misconduct and corruption relating to public administration.

[1] Corruption Perception Index , Transparency International Australia: Submission 11 p.6 Selects Committee on the Establishment of a National Integrity Commission April 2016

The increasing role and power of large corporations in relation to Government is also a transformative factor. The close linkages between these corporations and Government /public administration is manifest in many ways: the regular interchange of personnel – including the movement of ex Ministers and bureaucrats into employment with corporations; the significant representation of corporations on boards and committees; corporate donations to political parties ; joint public-private ventures etc.

These close linkages between the public and private sectors, including at the corporate level, are of course, not in themselves a negative in terms of the public good. They are an integral dimension of Australia's economic and social structure and generate much public good. But they also create a great opportunity for many kinds of corruption.

Notwithstanding gestures at transparency (eg federal register of lobbyists) it is impossible for the public to have any meaningful knowledge of the extent and influence of corporations and the lobbyists over public policy, legislation, development decisions, mining approvals, environmental decisions, tendering processes and the awarding of contracts etc.

There is abundant precedent for us to know that lack of transparency relating to public administration will encourage corruption to flourish.

NSWCCL considers that current levels of corruption and misconduct relating to public administration in Australia are probably underestimated and that the extent and complexity of corrupt activity relating to public administration is certain to increase.

Effectiveness of current multi- agency approach

This submission does not provide detailed comment as to the effectiveness of the existing Australian Government multi -agency approach to anti-corruption. Others are better situated to do so in that they have detailed working knowledge of the operation of national agencies with anti-corruption and misconduct responsibilities and have put detailed evidence and arguments to numbers of inquiries over recent years - including the current and the immediately preceding 2016 Inquiry.

Overall these confirm our broad view that it is difficult to achieve an adequately integrated and effective anti-corruption strategy through a multi-agency approach that has developed in an ad hoc fashion over time -even if the key agencies are reasonably effective within their own jurisdictions. The successful aspects of the current multi-agency approach – ie the knowledge and expertise that comes with a focused anti-corruption responsibility within a single agency or related group of agencies - should not be lost with the establishment of a NIC .

A key task in the establishment of a NIC will be to identify the most effective interface and distribution of responsibilities between the broad based overarching integrity body and existing agencies with anti-corruption responsibilities.

The Government's contrary view has been restated by the Attorney General's Department submission to the 2016 Inquiry:

'The Australian Government is committed to stamping out corruption in all its forms. The Government does not support the establishment of a National Integrity Commission. The Government has a robust, multi-faceted approach to combating corruption…"

"As part of Australia's multi-faceted approach to combating corruption, a range of government institutions have specialised roles and responsibilities in deterring, detecting and responding to corruption. These institutions include parliamentary committees, government departments, statutory authorities and law enforcement agencies. This holistic approach to anti-corruption includes standards and oversight, detection and investigation, prosecution and international cooperation."[2]

This is not surprising and not overly persuasive as few organizations invite strong external scrutiny and it would also be unusual for a public service agency to ignore the Government's policy position in a public submission. Governments are inherently reluctant to establish powerful, independent agencies likely to expose misconduct and corrupt activity within their own ranks or administration and only act when the community/electoral pressure is sufficiently strong.

As is widely noted, the current approach has obvious shortcomings: responsibility gaps, jurisdiction is not easy to understand; no clear point of access for persons wanting to report corruption – and the multi-agency approach does not cover large parts of Federal public administration. Some of these problems could be patched up - but the core issue is overall effectiveness in detecting, exposing and deterring corruption and misconduct across the sector and establishing credibility with the public. The current approach has not delivered public confidence that systemic corruption is adequately addressed. It is likely to be less effective in the future with evolving more complex manifestations of corruption.

NSWCCL considers it clear that the current multi-agency approach to anti-corruption relating to public administration is currently inadequate and will be increasingly inadequate with future developments.

Recommendation 1

NSWCCL recommends that stronger freedom of information and whistle-blower protection laws and a significant reduction of current secrecy laws and provisions relating to public administration are implemented in conjunction with the establishment of a NIC as necessary reforms for a credible and effective anti-corruption strategy.

A national anti-corruption body

NSWCCL considers that there is no convincing evidence or argument to suggest that effective action against corruption can be achieved through the existing multi-agency model and therefore supports the need for a dedicated national anti-corruption body. Essentially the same arguments that

[2] Attorney-Generals Department submission 23: Select Committee on the Establishment of a National Integrity Commission April 2016 . p2

eventually led to the establishment of broad based ACAs in the States apply and should similarly prevail at the national level.

We are in agreement with the summary statement made by TIA:

> *'In TI Australia's view, there can at this time be no serious case put forward against the establishment of a broad-based federal anti-corruption agency, if well designed. The community demands it and the circumstances of our time urgently require it. The principal outstanding questions are what forms it should take, what behaviour should be targeted, what power it should have, what procedures it should follow, and what limits should be placed on it.'* [3]

Recommendation 2

NSWCCL supports the establishment of a broad based National Integrity Commission as necessary for effective investigation, exposure and prevention of corruption relating to national public administration.

Timing and process

We note that some of the key submissions to this Inquiry (including the 2016 inquiry) [4] argue for a further staged process of analysis before deciding whether a national anti-corruption body should be established. While we understand the reasons for arguing this way – we are concerned that such a cautious and indecisive outcome from this Inquiry would be another opportunity lost and a mistake.

This issue has been addressed a number of times over the last decade or so. A similar recommendation for staged process through COAG was recommended in 2010 and came to nothing[5]. We are concerned that if there is no firm recommendation for the establishment of a NIC from this Inquiry, the same lack of follow-through would again be a likely outcome.

Given there appears to be greater openness for action on this issue in the current Parliament than was previously the case, a decisive recommendation may generate positive outcomes. This may not be so at a later time.

Recommendation 3

NSWCCL considers it important that this Committee of Inquiry affirms the urgent need for a broad based national anti-corruption agency and recommends that the Government take action to establish it as quickly as possible.

This is not to argue that the further work on developing a national anti-corruption framework should not continue though COAG. It is clearly necessary and will no doubt continue to evolve over the long term with the NIC as a participant in the discussions.

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[3] Sub 21 Transparency International Australia Submission 21 to Senate Select Committee on a National Integrity Commission 2017 13/4/17 p3

[4] Notably: The Law Council of Australia Submission 18 to Select Committee on the Establishment of a National Integrity Commission April 2016 p3.

[5] Report of Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, July 2011, Recommendation 10.

In the shorter term, if the Government determined to establish a NIC, there would obviously need to be further consultation and discussion around some of contentious issues relating to its jurisdiction and its extraordinary powers and their exercise. Different suggestions have been made as to the most appropriate relationship between the NIC and existing national anti-corruption agencies – notably the Australian Commission for Law Enforcement Integrity (ACLEI), the AFP Fraud and Anti-Corruption Centre and the newly established Independent Parliamentary Expenses Authority.

The most appropriate way to proceed will need to be teased out and tested before legislation could be finalized. This could best be achieved by the release of a draft consultation Bill for public consultation over a reasonable period of time (at least 2 months).

Recommendation 4

NSWCCL agrees that further work through COAG to develop a comprehensive national framework and strategy to address corruption and assess the nature, extent and impact of corruption in Australia is essential. However, this ongoing project should not delay the threshold decision to establish a broad based national anti-corruption agency.

Recommendation 5

Should a decision be made to establish a NIC, a further opportunity for public consultation and feedback should be provided to allow a focused consideration of the detailed proposal. This could best be achieved through a draft consultation bill and a reasonable period of several months allowed for responses.

3. NATIONAL INTEGRITY COMMISSION SCOPE

Whole of Government/public administration

The current Australian context is not open to consideration of a comprehensive anti-corruption body encompassing all sectors along the lines of the Hong Kong agency - although there are merits in such a comprehensive approach.

NSWCCL considers that the NIC must encompass all areas of public administration in which serious corruption and misconduct does or could occur. We are therefore strongly of the view that the totality of Government activity and public administration should come within its scope. It is essential that it includes public sector entities outside the core Public Service and the Federal Parliament.

Corruption and misconduct are more difficult to detect in the non-public service agencies as less information about their operations is publicly accessible. Freedoms of information laws do not always apply and 'commercial- in –confidence' protections are regularly utilized as a barrier to public scrutiny.

Corruption and misconduct are more difficult to detect in the non-public service agencies as less information about their operations is publicly accessible. Freedoms of information laws do not always apply and 'commercial-in-confidence' protections are regularly utilized as a barrier to public scrutiny.

It is appropriate and necessary that the NIC have jurisdiction in relation to serious misconduct and corruption within non- public service entities if the national integrity strategy is be credible and effective

Parliamentary jurisdiction

The inclusion of Ministers and their staff, parliamentarians and the electoral process is pivotal to a credible and effective anti-corruption strategy. Regular exposure of corruption, misconduct and unethical behaviour by members of parliament, political parties and individuals in these important arenas has a devastating impact on public respect for, and confidence in the overall integrity of Government, public administration and our democratic process.

The Australian Government does recognize there is a serious credibility issue relating to the behaviour of politicians and has recently moved to strengthen the oversight of parliamentary entitlements with the establishment of an Independent Parliamentary Expenses Authority (IPEA). This is a small step in the right direction in that it will likely act as a deterrent to blatant abuse of expense entitlements and bring more information about abuses into the public arena.

However, as detailed in the George Williams and Harry Hobbs in their submission to this Inquiry, IPEA 's powers are inadequate. It cannot impose sanctions on a MP for refusal to provide documents relating to work and travel expenses if the information might incriminate the person or expose the person to a penalty. Nor does it appear to be able to impose any sanctions other than the recovery of payments.

> *Despite the introduction of the IPEA, Australia's anti-corruption and integrity system still lacks an effective mechanism for holding federal politicians accountable at the same standards as other members of the public. This is clear when contrasted to the UK IPSA, which operates under an enhanced transparency regime, and with considerable powers of enforcement and sanction.*[6]

If corruption in relation to Parliament and electoral processes is not seriously addressed- and not seen to have been seriously addressed by the Australian community – we have no chance of rebuilding community confidence in the integrity of Government or public administration.

It is very important to a credible national integrity strategy that the NIC has jurisdiction in relation to serious misconduct and corruption within Parliament.

Recommendation 6

NSWCCL recommends the NIC has jurisdiction across the totality of national public administration including all public service agencies, public sector entities outside the public service, Federal Parliament including ministers and their staff, members of Parliament and the federal electoral and funding systems.

[6] George Williams and Harry Hobbs Submission 8: Select Committee on a National Integrity Commission April 2017 p8

4. CORRUPT ACTION BY A PERSON NOT A PUBLIC OFFICIAL

A jurisdictional issue of major significance for the scope of ICAC's powers recently emerged in NSW as a result of the Margaret Cunneen case[7]. Prior to this case:

> *ICAC and perhaps most lawyers believed that the ICAC Act defined as "corrupt" any conduct by a member of the public that could have adversely affected the way that a public official carried out their functions irrespective of whether the action could have affected a public official's probity or propriety. It was widely believed that it would be a sufficient basis for ICAC to investigate a person's conduct if their own corrupt conduct could interfere with or harmfully affect the way a public servant administered the affairs of the State.*[8]

The High Court, in a majority decision, limited ICAC's investigation power to corrupt conduct which could affect the probity or propriety of a public official. This removed ICACs power to investigate corrupt conduct adversely affecting public administration unless it adversely affected the probity and propriety of a public official.

This decision was met with widespread dismay as it would preclude ICAC from investigation of widespread fraud and corruption adversely affecting public administration from outside sources. which in many cases did not involve corruption or knowledge of any public officer.

NSW politicians responded to the public pressure. The Government referred the issue to the Gleeson and McClintock review which recommended an amendment to the ICAC Act to substantially restore this power[9]. The Government acted on this recommendation and a new sub-section was added to the ICAC Act to achieve this:

(2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

(a) collusive tendering,

(b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,

(c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,

(d) defrauding the public revenue,

(e) fraudulently obtaining or retaining employment or appointment as a public official.

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[7] Independent Commission Against Corruption v Margaret Cunneen & Ors [2015] HCA 32

[8] Phillip Boulten SC: "A Parallel Architecture Of Justice" Jeff Shaw Memorial Lecture 2015, June 2015

[9] Review of the Jurisdiction of the Independent Commission Against Corruption Report: Independent Panel The Hon. Murray Gleeson AC (Chair) Mr Bruce McClintock SC 30 July 2015. (Gleeson and McClintock 2015) Recommendation 1. NSW ICAC Act (1988) s8

This amendment was supported by all major parties in the NSW Parliament - reflecting an awareness of community support for the restoration of this power to ICAC.

NSWCCL considers it immensely important that the NIC has similar power to investigate corrupt behaviour by private citizens adversely affecting public administration.

Recommendation 7

NSWCCL recommends that the NIC should have the power to investigate serious and/or systemic corrupt conduct by a person not a public official when the corrupt conduct will have an adverse effect on public administration. It should not be a requirement that the conduct affects the propriety or probity of a public official in the exercise of an official function.

5. NATIONAL INTEGRITY COMMISSION POWERS

NSWCCL cautiously supports the need for the NIC to be given extraordinary powers similar to those available to state ACAs. This is conditional on the inclusion of strong safeguards for individual liberties and rights being incorporated into the legislation. These safeguards should be the strongest that are compatible with operational effectiveness.

These powers and related issues have been subject to much public analysis and review at the state level since 1988. Notwithstanding some variations, there is significant commonality in the objectives and the powers (including the important safeguards) available to the state ACAs. [10] Most of the sensitive and contentious issues have been subject to extensive scrutiny and review in one or more of the states.

In relation to the NSW ICAC, a series of reviews from 2005 to 2016 –and notably McClintock 2005 and Gleeson and McClintock 2015 - have led to stronger safeguards and clearer guidelines for the exercise of its extraordinary powers[11].

There is thus an abundance of informed analysis and guidance available to assist in determining appropriate objectives, powers and strong safeguards for the NIC.

Recommendation 8

NSWCCL recommends that the experience of the state ACAs, including recent reviews of these agencies, should be analysed as a basis for deciding appropriate objectives, powers, safeguards and procedures for the NIC.

Public hearings

[10] For a recent summary see: Report to the Premier: Inspectors Review of ICAC, 12 May 2016 (ICAC Inspectors Report 2016) paragraphs 55-62.

[11] Bruce McClintock, *Independent review of the* Independent Commission Against Corruption Act 1988*, Final Report* (2005) ("McClintock 2005 "). Gleeson and McClintok 2015.

Bruce McClintock SC in his 2005 review of ICAC's powers observed that deciding to hold a public hearing was "*one of the most controversial decisions that ICAC may make*."[12]

There is a good reason for this level of controversy about this power. There is a serious tension between the potential for unfair reputational damage for individuals being publicly investigated without the protection of a fair trial before a court - versus the undoubted public good that flows in many ways from open investigation and exposure of corruption in these hearings.

All but one (South Australia's ICAC) of the state anti-corruption agencies (ACAs) have the power to hold public hearings as part of their investigations. However different criteria and constraints apply to the exercise of this common public hearing power [13]

NSWCCL considers public hearings- properly conducted and consistent with public interest criteria – are essential to the effective operation of ICAC and similar bodies. We note that submissions to the Inquiry present a range of views on this issue and so will set out the NSWCCL position in some detail.

NSWCCL has followed many of ICAC's public inquiries and the debates that have erupted from time to time. We have also noted developments in other states.

In our assessment the use of public hearings by ICAC has overwhelmingly benefited the public good. It has also provided valuable and proper transparency to ICACs investigations which, by allowing public scrutiny of part of ICAC's operations, provides an important dimension of oversight of the agency. It has also been hugely important in exposing the level and nature of corruption in NSW which is a positive in itself- but also generates much needed pressure on Governments to take appropriate anti-corruption action.

The public hearings, in so far as they have built considerable community support for ICAC, also importantly create some level of protection from inappropriately motivated Government interventions around ICAC's powers.

We recognise that ICAC public hearings have in some contexts caused unfair reputational damage to individuals. This possibility of this is not likely to be eliminated if public inquiries are held. However recent amendments to the NSW Act have strengthened safeguards and should minimise unfair process and reputational damage.

The NSW ICAC has discretionary power to hold a public inquiry if it is in the public interest. This power has been subject to a number of reviews since 2005[14] and so far has survived strong pressure from some quarters to remove it. There have however been amendments address some of the concerns about it relating to its use.

In his 2005 review Bruce McClintock SC considered criticisms of ICAC's public hearing power. He concluded:

> *'…public investigations are indispensable to the proper functioning of ICAC'*[15].

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[12] McClintock 2005, para 6.5.31.

[13] Variations are listed in 'ICAC Inspectors Report 2016' paras 55-62.,

[14] McClintock 2005; Gleeson and McClintock 2015; ICAC Inspectors Report 2016; Report of Joint Parliamentary Committee on the ICAC: Review of The Independent Commission Against Corruption: Consideration of The Inspector's Reports, October 2016

[15] McClintock 2005

He recommended a minor change to the description (public 'inquiry' not public 'hearing') to signal that a public inquiry was of an investigative nature. He also recommended specification of matters which **must** be considered by ICAC in determining that a public inquiry was in the public interest. [16] Apart from providing stronger guidance, this significant amendment clearly signalled that a public inquiry was not the default option. These recommendations were incorporated into the Act:

> ***s31 Public inquiries***
> *(1) For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry.*
> *(2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:*
> *(a) the benefit of exposing to the public, and making it aware, of corrupt conduct,*
> *(b) the seriousness of the allegation or complaint being investigated,*
> *(c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),*
> *(d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.*

The public inquiry power was again put under intense public scrutiny in NSW following the Cunneen case and three inquiries were held in 2015/6.

The Inspector of ICAC recommended that all inquiries be held in private.[17] This recommendation conflicted with the findings of the independent review by Murray Gleeson and Bruce McClintock at about the same time which strongly supported ICAC's power to hold public inquiries:

> *'Public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes."*[18]

> *'The Panel does not consider any change to or further restrictions upon the ICAC's powers to hold a public inquiry should be introduced.'*[19]

The conflicting views of the Inspector and the independent review were themselves considered by the NSW Joint Parliamentary Committee on ICAC in 2016. This Committee rejected the Inspector's recommendation to abolish public inquiries but did recommend a significant constraining amendment:

> *"…. public inquiries have many benefits, greatly assisting the ICAC to expose corruption, and increasing transparency by helping to hold the ICAC itself accountable. The Committee has concluded that attaching more weight to the decision to commence a public inquiry would appropriately balance the Inspector's concerns with the benefits of public inquiries".* [20]

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[17] ICAC Inspectors Review 2016 Rec 1.
[18] Gleeson and McClintock review 2015, Par 9.4.6
[19] Ibid Par 9.4.10
[20] Joint Parliamentary Committee on the ICAC. Review of The Independent Commission Against Corruption: Consideration Of The Inspector's Reports: Report 2/56 – October 2016, ppviii-ix

The Joint Committee's proposal to achieve this was to increase the number of commissioners from one to three and require majority agreement for the use of the ICAC's extraordinary powers- including the decision to hold a public inquiry. [21] The NSW Government implemented this proposal.

This spread of responsibility for decision making was made on the grounds that it is likely to minimise errors of judgement in exercising ICAC's extraordinary powers[22].

The extensive NSW experience on this matter is useful. It is significant that notwithstanding considerable controversy, both independent and expert reviews in 2005 and 2015 and the Parliamentary Committee Review in 2016 reaffirmed the importance of retaining public hearings for the effectiveness and standing of ICAC.

NSWCCL considers the power to hold public hearings – consistent with appropriate public interest and fairness criteria and procedural safeguards - to be indispensable for the overall effectiveness of broad based ACAs. We therefore consider the success of a NIC will depend on it having similar power to hold public hearings as part of its investigations.

Private hearings as default position

We note that that the LCA in its most recent submission[23] recommends that, if the NIC has the power to hold public hearings, it should adopt the Queensland approach for the QCCC which specifies a default position: "*Generally, a hearing is not open to the public".* [24]

The QCCC can decide to hold public hearings if specified criteria are met. In the case of a criminal investigation a public hearing can be held if the Commission considers it will '*make the hearing more effective*' and '*would not be unfair to a person or contrary to the public interest'*. For an investigation for other than a criminal matter a public hearing can be held if the Commission considers '*closing the hearing to the public would be unfair to a person or contrary to the public interest*'.[25]

While this formulation allows public hearings if the Commission considers the criteria are met, it is less likely to generate public hearing than the NSW ICAC model. This view is strengthened by the fact that the QCCC has not held a public hearing since 2010.[26] NSWCCL held 9 public inquiries in the 2013/14 year and 7 in the 2014/15 year[27].

NSWCCL does not support the Queensland private/public hearing model for the NIC.

Victoria and Western Australia allow public hearings as exceptions to private hearings. Each has different criteria but both include a version of public interest versus prejudice/unfairness factors.[28]

[21] Ibid Rec 2.
[22] There is division of opinion as to the merits of this amendment.
[23] LCA submission no 18 paras 51-51
[24] Queensland Crime and Corruption Act 2001. s 171(1)
[25] Ibid s171(2)
[26] ICAC Inspector Review2016 par 57.
[27] Gleeson and McCintock review 2015, par9.2.5
[28] S117 Independent Broad –Based Anti-Corruption Act (2011); S139 Crime and Misconduct Act 2013 (WA);

The SA Independent Commission against Corruption does not have the power to hold open inquiries. [29] (NSWCCL understands that there is a deal of dissatisfaction in SA with the SA ICAC approach and its impact on its overall effectiveness.)

Theoretically the NSW, Victorian and WA models, which are in the end all discretionary, could lead to similar patterns of decisions as to when it is considered appropriate to hold public or only private hearings for an investigation. However, a heavy signal towards private hearings as a default position is in practice likely to lead to fewer public hearings.

Given the importance we give to public hearings in the overall effectiveness of ACAs and in the building of trust and confidence in public administration and Government, NSWCCL favours specifications which set clear decision-making criteria but do not nominate either public or private hearings as the default option.

On the basis of the NSW ICAC experience and outcomes NSWCCL considers that the NIC should have the discretionary power to hold public hearings of its investigations.

Recommendation 9

NSWCCL considers the power to hold public hearings – consistent with appropriate criteria - are indispensable for the overall effectiveness of broad based ACAs.

Recommendation 10

NSWCCL recommends the National Integrity Commission have the power to hold public hearings as part of its investigations. The decision to exercise this power in individual investigations should be decided on the basis of public interest and fairness criteria similar to those in section 31 of the ICAC Act (1988) NSW.

Recommendation 11

The power to hold public hearings should be discretionary on the basis of consideration of the specified criteria and procedural guidelines and should not be constrained by specification of either public or private hearings as the default position.

6. OTHER MATTERS

NSWCCL offers the following summative comments on important but non-controversial matters.

NSWCCL strongly supports the NIC having an educational objective similar to that in the NSW ICAC Act :

> *"to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community"* [30]

The NIC should be effectively funded for this important role.

[29] s3(c) Independent Commissioner against Corruption Act 2012 (SA)
[30] NSW ICAC Act s2A(a)(ii)

The NIC should be subject to strong and effective oversight including Parliamentary oversight and non- merit judicial review.

Accountability and oversight mechanisms should as far as possible not compromise the independence of the NIC from inappropriate Government interference in its operations.

7. CONCLUDING COMMENTS

NSWCCL hopes this submission is of assistance to the Committee in its consideration of this extremely important matter. We are available for further discussion on any aspect of this submission.

The submission was written on behalf of NSWCCL by Dr Lesley Lynch (VP NSWCCL) with assistance from Pedram Mohseni (NSWCCL Committee member) and other members of the NSWCCL Committee.

Yours sincerely

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