



STRENGTHENING GOVERNMENT INTEGRITY

**BY EMAIL**

1 February 2019

Mr Chris Moraitis PSM  
Secretary  
Attorney-General's Department  
Australian Government  
Canberra

anticorruption@ag.gov.au

*Chris*  
Dear Secretary,

**Re: A Commonwealth Integrity Commission – proposed reforms**

The Accountability Round Table (ART) is a non-partisan organization, comprising former parliamentarians, retired judges, academics, business people and other engaged citizens who are concerned with the current erosion of honesty and integrity in our democracy. The ART is dedicated to improving standards of accountability, probity, transparency and democratic practice in all governments and parliaments in Australia.

The establishment of a national integrity commission (often referred to as anti-corruption commissions) was the first recommendation of a five-year National Integrity System Assessment conducted by the Australian Research Council Key Centre for Ethics, Law, Justice and Governance and Transparency International led by Professor Charles Sampford with Dr, now Professor, AJ Brown as the principal author of the final report. That report was launched on 9 December 2005. In the last 13 years of public and parliamentary debate, expert opinion has firmly moved behind the establishment of a body similar to New South Wales's ICAC and Queensland's CJC/CMC/CCC<sup>1</sup> with the powers and resources required to promote integrity and to comprehensively and effectively investigate alleged corruption and prevent it from occurring and recurring.

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<sup>1</sup> The Criminal Justice Commission (CJC) was established in 1989 following a key recommendation of the Fitzgerald Inquiry (officially named "Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct"). The subsequent name changes to Crime and Misconduct Commission (CMC) and Crime and Corruption Commission (CCC) occurred as part of a complex history with many lessons to be learned – the first of which is that a strong ICAC type body develops a great deal of legitimacy but that attempts to weaken them do not.

On 1 October 2018 the ART wrote to the Prime Minister and Attorney-General (A-G) supporting the establishment of a well resourced, “one stop”, national integrity commission with the appropriate powers needed to be effective. Our members have argued for the establishment of such a commission for many years and we welcome the broad political support for the establishment of such a body and the opportunity to contribute to this consultation process.

The proposal put forward by the Morrison Government to establish a Commonwealth Integrity Commission (CIC) has, in our considered opinion, some positive features. Regrettably, however, it is well behind best practice and the arguments put forward to defend it provide a textbook example of an anti-corruption commission that can only pay lip service to the delivery of effective accountability and transparency across the Commonwealth public sector.

This submission commences by referring to positive aspects of the model. It then discusses structural and process issues, suggesting how some could be strengthened, before focusing on the CIC’s glaring shortcomings.

In short, the ART is extremely disappointed, and at times dismayed, with key elements of the model. Its divided structure, comprised of a Law Enforcement Division (LED) and Public Sector Division (PSD), is clearly designed to protect certain elements of the public sector through opaque processes. The ART fears that if legislated in its suggested form, or close to it, the CIC will, through no fault of its own, be incapable of delivering to the Australian people the level of accountability and transparency they are demanding from their government.

### **Positive elements**

#### *Promoting integrity not just combating corruption*

The A-G’s CIC proposal recognises that the institutions of the integrity framework aim to promote integrity as well as preventing, detecting and investigating corruption (something anti-corruption experts have been strongly advocating for some time). However, the CIC does not appear to have an explicit, well-defined role in promoting integrity, and it should.

#### *Prevention*

Having said that, it is good to see that the CIC is to adopt a proactive and reactive approach to its functions in dealing with corruption. The proactive dimension has several advantages, not the least being that:

- A reactive only approach does little, if anything, to address factors that lead to corrupt conduct in the first place.
- A proactive approach identifies the ‘red flags’ that point to the likelihood of corrupt conduct occurring and recurring and allows for individual, group and institutional behaviour, and corruption facilitating systems, to be modified before they lead to corruption.

- Relationships with public servants, public sector departments and statutory authorities are less fraught when an integrity commission is also engaged in preventive activities for it means that the integrity commission is not perceived as only wielding a big stick. It can also become a proactive partner in achieving what the vast majority of public servants desire: a corruption free workplace.
- A prevention role also allows staff of an integrity commission to work with government departments, statutory authorities and others to devise evidence-based prevention strategies. Working together to achieve a shared goal facilitates respect for the role of all parties involved in the corruption prevention task.
- A prevention approach encourages the CIC to research and identify risks and to adopt strategies to minimize those risks rather than waiting for evidence to emerge that a risk has already materialized.<sup>2</sup>

### *Referral powers*

The ability of various integrity agencies to refer complaints to other bodies is an important part of any integrity system/framework. They should be specifically encouraged (as they are in the proposal) and facilitated by regular meetings of the heads of integrity agencies to discuss interagency processes.

### *Investigative reach*

It is sensible and necessary for any national integrity commission's reach to include, as the CIC model does, the investigation of:

Members of the public or other private entities that receive or deal with Commonwealth funds...to the extent that their suspected corrupt conduct intersects with a public official's suspected corrupt conduct.<sup>3</sup>

The ART suggests that the CIC's reach should be broadened to encompass anyone who deceitfully/wrongly influences or endeavours to influence public sector decision-making in a corrupt manner. One of the reasons the ART is arguing for a broader reach is that corruption in the public sector ultimately defrauds or attempts to defraud the Australian taxpayer. It is, therefore, in the public interest for the CIC to have the broadest reach possible.

The ART notes that the consultation process regarding the proposed model canvases whether the national integrity commission could be given jurisdiction over members of the federal judiciary.

The independence of the judiciary must always to be protected and preserved. To detract in any way from this principle would be to dismantle one of the crucial cornerstones of democracy.

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<sup>2</sup> See IEGL submission on NIC for detailed discussion.

<sup>3</sup> Australian Government, Attorney-General's Department, (2018, p. 4) *A Commonwealth Integrity Commission – proposed reforms*, Australian Government, Canberra.

The ART accepts that there needs to be a body to investigate judicial wrong doing at the federal level. While the Parliament is and must remain the only avenue for removal of a judge, it is very poorly equipped to investigate whether the grounds for impeachment are met. Either a separate unit in the CIC or a stand alone Federal Judicial Commission should be charged with that role and make recommendations to Parliament on impeachment matters. The heads of jurisdictions should be consulted on the appropriate model and consideration given to replicating the State judicial commissions operating at present.

#### *Failure to report public sector corruption*

The proposition that a 'failure to report public sector corruption' be included as an offence in the Criminal Code is another sensible element of the proposed model. The inclusion of this new offence means that it is in the best interest of superiors, colleagues and others aware of corrupt conduct, to report their well-founded suspicions or knowledge of corruption to the CIC rather than covering it up in a misguided effort to protect individuals, groups or the reputation of a public sector institution. All Australians are only too aware of the horrific stories revealed through the public hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse. It revealed, publicly, how protecting the reputation of colleagues and institutions took precedence over reporting suspected and known criminal acts.

The ART is seeking clarification on whether the offence of failure to report public sector corruption applies to parliamentarians and their staff. It appears that it does not, in which case the ART is asking for a detailed explanation as to why this group would be excluded from the offence and for the explanation to be made public. Indeed, parliamentarians' contact with their electors is a traditional source of information about the performance of government and its members. Whereas most of the information will be about the implementation of policy and maladministration, it may also provide insights into possible corruption.

However, it might be a very rare case where a public servant, member of parliament (MP) or a political staffer 'knows of information that would lead a reasonable person to believe that an employee or agent of the agency has engaged in conduct which would if engaged in, constitute one or more of the offences in the public sector division of the Criminal Code.' This sets a very high standard. It requires belief (rather than merely reasonable suspicion) of a potentially complex legal conclusion.

The public should have a legitimate expectation that public servants, MPs, political staffers and citizens would be much more pro-active than that. If any have evidence of potential corruption (direct or indirect – such as an extravagant lifestyle inconsistent with an official's means), the community would want them to report it. Accordingly, there should be positive duties to report suspicions and identify risks built into ethical standards, performance reviews and into the promotion system.

At some point the criminal offences would apply, but in a graduated way. As in so many areas of governance, it is first necessary to identify the behavior you want to achieve, recognize it and reward it, using criminal sanction as a back stop for significant breaches.

Another limitation of this provision is that it appears to be confined to the relevant public servant's agency. What if a public servant were to believe that a member of another agency or a politician was most likely engaged in corrupt conduct. Would Australians not expect them to report that conduct and be punished if they did not?

### **Some structural and process issues**

#### *Senior management*

The CIC model proposes a Commissioner, supported by two Deputy Commissioners, to head the CIC. The Deputy Commissioners would have responsibility for either the proposed Law Enforcement Division or Public Sector Division (refer below for the ART's comments on separate divisions).

The ART suggest that the A-G's Department consider expanding the senior management team by including four part-time commissioners. This Fitzgerald inspired approach, which is still a feature of Queensland's anti-corruption commission, would address some of the concerns expressed by the A-G's Department and by the Attorney-General.

The part-time commissioners should include a practicing legal practitioner with proven experience in addressing civil liberty matters; of the remaining three all should have a proven record in community engagement with one having demonstrated senior managerial experience in a large organization. None should be former politicians or political advisers to parliamentarians or government.

The background and experiences of the part-time commissioners reflects Fitzgerald's attempt to ensure that a powerful anti-corruption commission, driven largely by legal considerations, also has a civil liberty legal focus and non-legal input at the highest decision-making level. The inclusion of part-time commissioners could help to prevent an inward looking, insular culture from developing in the CIC.

#### *Appointment process*

The commissioner of the CIC should be a judge, a retired judge or be a person who is qualified for appointment as a judge.

The appointment period for the commissioner should be for five years only. In the case of part-time commissioners, it may be appropriate for the appointment to be for a shorter period, say three or four years. This suggestion is made as some part-time commissioners could have other part-time employment. The all-party parliamentary committee should make the final decision in relation to the term of any part-time commissioner but it should not be for less than three years.

To avoid the politicisation of what is, in effect, a standing royal commission, all commissioner appointments must be made by an all-party parliamentary committee that reflects the composition of the Parliament (major and minor political parties and independents). Appointments must be approved by a majority on the committee – and that majority must include a government and opposition member and, if possible, an independent.

### *Who shall guard the guardian?*

The CIC must be responsible to a standing, dedicated, all party parliamentary committee that reflects the composition of the Federal Parliament. The committee would be responsible for monitoring and reviewing the CIC. Members of the committee should continue to serve on the committee even when the House of Representative and Senate have been dissolved for an election. In other words, a committee member's term of office should continue until committee members are appointed by the new parliament.

The committee should meet with senior members of the CIC approximately every six to eight weeks. It should also conduct a three-yearly review of the CIC and in so doing should call for public submissions. The committee should be obliged to report to the Parliament on a yearly basis and be able to issue special reports on a particular matter of concern. Its three-yearly review report should also be tabled in the Parliament.

All reports by this important monitor and review committee should be debated in the Parliament and the government should be obliged to respond to findings in committee reports within three months of a report being tabled. This will prevent standing committee reports being simply rubber stamped through the Parliament.

The problem that needs to be addressed in relation to the all-party parliamentary committee is how to prevent it splitting along party political lines. This has happened in state parliaments but only parliamentarians and the parties to which the majority belong can prevent this from occurring at the federal level. The challenge is how to ensure all members act in the public interest rather than personal or party interests.

To investigate any allegations of misconduct or corruption by any member of the CIC, an independent "Inspector" should be appointed by the all party parliamentary committee, not by the executive.

The ART does not support the Inspector being constrained by a "reasonable suspicion" barrier. Once appointed the Inspector should have the ability to use her or his discretion about whether to respond to anonymous complaints or other events that lead to the suspicion of serious misconduct and corruption.

### *Funding*

It is a fundamental requirement for effectiveness that the CIC be properly funded as "powers without resources translate to no powers". Even if the CIC were to be the most powerful anti-corruption body in Australia, it would be unable to operationalize its powers if it lacks the resources to do so. In the past, this was an issue for the Commonwealth Ombudsman and the significant underfunding of the Australian Commission for Law Enforcement Integrity has been, for too many years, one of the barriers to its effectiveness.

When justifying the CIC's proposed budget, the A-G's Department has referred to the budgets of state-based anti corruption bodies and compared them with each other and with the CIC. Such comparisons are somewhat meaningless as it is comparing apples with oranges. States differ widely in many respects, not the least being the size of their population and size of their public sectors and their anti-corruption commissions often have differing powers and jurisdictional reach.

A federal anti-corruption body that has to investigate allegations of corruption from Darwin to Hobart and Perth to Sydney cannot be compared with an organisation that is responsible for a state the size of Victoria or Queensland. Members of the Australian Federal Police (AFP), for example, are deployed across Australia as is many other staff employed by the commonwealth in law enforcement and other public sector roles.

The Australia-wide jurisdiction of the CIC also raises the question of how many offices it will require and where those offices are best located. It is not necessarily Canberra.

#### *ASIC, APRA, ACC, ATO*

A number of bodies have been added to the list of those supervised by the LED. The ART has no general objection to this but does note that APRA and ASIC have been heavily criticized as ineffective in dealing with banking misconduct. It is not clear that the LED will be able to make them more effective and we do note that those who dislike being regulated often pursue two paths: to capture the regulator or to disable it by hobbling it with extensive strictures. The LED may become an unwitting vehicle for the latter without doing much about the former. If the new laws were to address regulatory capture, that would be a major advance.

#### *Research, Ethics, Education and Prevention*

Research, ethics, education and prevention need to be included in any effective integrity framework. The CIC is charged with prevention but it is not clear where research into corruption would fall. This requires clarification.

### **Impediments to the effectiveness of the proposed CIC**

#### *Own motion powers*

It is clear to independent experts in the anti-corruption field that all investigative divisions of an anti-corruption body must have own motion powers. It appears that the proposed CIC model precludes the PSD from freely exercising such powers. It is only permitted to do so when the Division discovers corruption in the course of undertaking an existing investigation and in circumstances where the newly discovered corruption relates to a criminal offence, and where the very high threshold for an investigation in the public sector is met.

It is not possible for an anti-corruption body to be truly effective if it is forced to jump unreasonable hurdles before it is permitted to act on its own initiative. In the interest of effectiveness, this impediment needs to be removed.

#### *Public complaints and information*

The Public Sector Division is not allowed to receive direct complaints from the public (generally considered an invaluable source of criminal intelligence). The proposal suggests that public complaints could be received by the Ombudsman or the AFP, investigated and then referred to the CIC under varying conditions.

While referrals are an important part of any integrity system, the point is to pass them on to the body most capable of doing the relevant investigation. The whole point of the CIC is to create a body with high capabilities to investigate corruption (and, it is hoped, understand its causes and develop remedies).

However, in both the above-mentioned cases the investigation has to be conducted by another body until it determines that a high threshold is met. While the AFP clearly has experience in criminal investigations, after the CIC is established it will not be the most expert in this field. The Ombudsman is totally inappropriate as she/he investigates, and is generally known to investigate, maladministration. The AG's paper envisages a member of the public going to a body that does not investigate corruption and that body having to investigate the alleged corruption until it makes a determination that criminal conduct may have occurred, at which point it can refer it to the CIC. It is not clear whether this is the same threshold as the CIC has for commencing an investigation ('a reasonable suspicion that the conduct in question constitutes a criminal offence'). If it is not, then the complaint may fall into limbo.

In many real cases, information may come in from a number of sources – whistleblowers, the public, a range of agencies, which have subjected complaints to triage and recognise evidence, or an indicator of corruption. A CIC can be alerted to risks and trends in corruption from research, past cases etc. and would need the power to open investigations on the most promising or worrying indications of possible corruption.

#### *Investigative threshold of the Public Sector Division*

Another unreasonable impediment to the effectiveness of the proposed CJC model relates to the proviso, that for the PSD to investigate corrupt conduct it must rely on the Commissioner having a 'reasonable suspicion that the conduct in question constitutes a criminal offence'.

This proviso, the ART maintains, is unwarranted and unreasonable as it will prevent the CIC from acting on many matters at a specific point in time, unless it can justify (possibly in open court,) that it has a 'reasonable suspicion that criminal conduct is very likely to or has occurred.

An anonymous telephone tip off is said to have activated inquiries that ultimately led to the Obeid case in New South Wales. If the Independent Commission Against Corruption in that state had been constrained from acting on the phone call because of a 'reasonable suspicion' hurdle, Mr Obeid's proven misconduct in public office may have remained undetected and hence still be occurring.

More generally, policing depends on information from the public, which is the greatest source of intelligence into wrong-doing (whether casual citizen calls or organized systems for collecting information such as 'Crime Stoppers' or 'Neighbourhood Watch'). However, that type of intelligence does not come packaged with sufficient information to reach a test of 'reasonable suspicion'. Unrelated bits of information may be insufficient to generate an investigation but further additions might.

In any case the 'reasonable suspicion' test is not applied to other police work so why should it apply to the CIC?

The 'reasonable suspicion' hurdles needs to be removed in the public interest.

The ART argues that the Commissioner of the CIC should be able to exercise her or his discretion in deciding whether or not to initiate an investigation. The standing, all party parliamentary committee with responsibility for recommending the appointment of the CIC Commissioner must be totally confident in the ability of that person to exercise their discretion wisely and in the public interest. If they are in the least skeptical about a candidate's ability to do so, they should not appoint them to the role. Once having appointed a Commissioner, that person must be allowed to make such decisions.

#### *'Retrospectivity'*

On 13 December 2018, The Sydney Morning Herald reported the Attorney-General as noting that the CIC "would not have retrospective powers, saying this was to be avoided in criminal law".<sup>4</sup> This involves an unfortunate confusion.

It is widely accepted that it is undesirable to introduce laws of retrospective operation in a range of circumstances, especially in criminal law. This is because of the inherent injustice of converting an innocent act into a criminal one or otherwise interfering with rights after the fact.<sup>5</sup>

The rule – or presumption - against retrospectivity states that statutory provisions are to be interpreted in a way that does not impose or alter pre-existing rights and liabilities without clear, unambiguous language. It is a rule of interpretation only, which may be displaced by clear language.<sup>6</sup>

However, the general principle that new criminal laws should not apply to past conduct does not generally apply to procedural issues and certainly not to the resources and institutions devoted to discovering past conduct. In applying the rule, Courts<sup>7</sup> draw a distinction between:

- a. "statutes which create or abolish substantive rights or liabilities', which are subject to the presumption against retrospectivity; and
- b. statutes that do not affect pre-existing substantive rights or liabilities, but are 'merely procedural'".

There is no injustice where legislation does not affect a person's past 'rights or liabilities' but regulates that person's future conduct by reference to some past act or omission.<sup>8</sup> The ART supports the ability of the CIC to investigate past conduct.

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<sup>4</sup> SMH 13 December 2018, David Crowe "Morrison backs national anti-corruption commission following Labor demands"

<sup>5</sup> See Sampford *Retrospectivity and the Rule of Law*, Oxford University Press, Oxford 2006

<sup>6</sup> *Maxwell v Murphy* (1957) 96 CLR 261 (*Maxwell*). See also Pearce & Geddes Chapter 10 "Retrospective Operation of Legislation" *Statutory Interpretation in Australia* (8<sup>th</sup> Edition, Lexis Nexis, 2014) (Pearce & Geddes) at 397. See further *Fisher v Hebburn* (1960) 105 CLR 188.

<sup>7</sup> *Maxwell* at 286 per Fullagar J, as considered in Pearce & Geddes at [10.22].

<sup>8</sup> *Geschke v Del-Monte Home Furnishers Pty Ltd* [1981] VR 856; *La Macchia v Minister for Primary Industry* (1986) 72 ALR 23; *Re a Solicitor's Clerk* [1957] 1 WLR 1219; *R v Vine* (1875) LR 10 QB 195; *Bakker v Stewart* [1980] VR 17 at 22; Pearce & Geddes at [10.4].

## Gravest concerns

### *A divided approach*

The proposal suggests the PSD have drastically limited powers compared to the current ACLEI and proposed LED (see Attachment B). The PSD will not have powers to arrest, seize evidence, undertake controlled operations and assumed identities or undertake integrity testing. They will also not have the discretion to conduct public hearings even if, in the Commissioner of the CIC's opinion, this would be useful in generating more awareness and information from the public.

The A-G's proposal argues that corruption by those supervised by the LED can more easily be concealed and 'can have a greater impact'. We should always assume a high level of competence by the corrupt and that those with such competence are likely to evade detection for much longer. As to the potential impact of corruption, those officials subject to the PSD are in charge of virtually the entire budget for recurrent funds and virtually all the assets of the Commonwealth. This provides targets for the corrupt in the billions and also provides ample reason for the PSD to have exactly the same powers as the LED.

There is no credible evidence to support the arguments put forward by the A-G's Department that the CIC should have two separate divisions: a Law Enforcement Division (see Attachment A for a list of 'law enforcement' agencies) and a Public Sector Division (see below), with different powers and different levels of transparency and public accountability.

The ART strongly rejects the proposal that the PSD will not be able to exercise arrest warrants, conduct public hearings or make findings of corruption, criminal conduct or misconduct at large in relation to:

Public service departments and agencies, parliamentary departments, statutory agencies, Commonwealth companies and Commonwealth corporation; Commonwealth service providers and any subcontractors they engage; and Parliamentarians and their staff.<sup>9</sup>

This disjointed approach to accountability, transparency and openness will be seen by the Australian community as a very real attempt by their elected members to wrap an opaque cloak firmly around these classes of people, and in particular themselves.

The A-G Department's stated position is suggesting that the public has a right to know what is happening in relation to the conduct of public servants working directly in law enforcement agencies or who exercise law enforcement powers, but not into any other section of the broader public sector or in relation to those in the private sector who provide services to the Commonwealth. Such an approach is not only demeaning to those working in law enforcement, the proposed protections offered to non-law enforcement actors does not reflect reality. For example, former Ministers Ian Macdonald and Eddie Obeid are currently serving prison sentences for matters relating to misconduct in public office. They are not the only parliamentarians to be sentenced to prison for similar offences. As a result of the publicly conducted Fitzgerald Inquiry, several Ministers were sentenced to prison terms for misappropriating public funds and some years later former Minister Gordon Nuttall served time for corruption, receiving secret commissions and theft. None of the inquiries into these parliamentarians were held in secret and nor should they have been, especially as MPs

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<sup>9</sup> Australian Government, Attorney General's Department, (2018), pp. 3-4) A Commonwealth Integrity Commission – proposed reforms, Australian Government, Canberra.

salaries and job related expenses are paid from the public purse. There are other cases of non-law enforcement corruption and serious misconduct. The ART refers the A-G's Department to the Securrency and Australian Wheat Board scandals as examples.

Should the A-G's Department require further evidence of misconduct and/or corruption in non-law enforcement sections of the public sector, the ART points the Department to public hearings conducted by state-based anti-corruption agencies.

The proposed divided model is at best ineffective and at worst an attempt to prevent transparency and accountability in large swathes of the public sector, including in relation to the conduct of MPs and their staff.

To repeat the point made earlier, the ART firmly rejects the idea of a divided CIC structure and instead strongly argues for a "one stop shop" approach to corruption prevention and the investigation of serious misconduct and corruption. It does so because there is no credible evidence to suggest the need for two discreet divisions with one division being excluded from the accountability and transparency that applies to the other division.

If this proposal is enacted into law, it will be viewed by many leading experts in the anti-corruption field as symbolic accountability and transparency, par excellence. The Australian community deserves better from its elected representatives and especially at a time when trust in parliamentarians, political institutions and the political process is at an all time low.

#### *Investigations and findings*

The PSD can only investigate conduct capable of constituting a nominated range of specific offences and will make no findings of individual criminal conduct of corruption at large.

Very few Royal Commissions are confined to individual guilt. Indeed, their wider powers are based on the view that some issues are so important that the public has a right to receive factual information and, where needed, remedies to the important issues investigated. This is why they can compel documents and testimony even though such compelled information cannot be used in criminal proceedings.

The same is true of "standing royal commissions" at state and federal levels that investigate significant ongoing issues. Accordingly, a CIC will always be trying to understand the context and drivers for the conduct investigated. It should try to understand the risks of corruption and the means for addressing (or 'insuring' against) that risk. It is very appropriate for the CIC to make general findings of corruption as well as identifying the risks and remedies.

Findings of individual criminally corrupt conduct are another matter. Such findings are for the courts. The ART is not objecting to the CIC concluding that, in their view, certain persons have cases to answer. In the current structure, this would involve handing a brief of evidence to the DPP, though the ART notes that in other jurisdictions, bodies equivalent to the CIC can charge, arrest and issue an indictment

#### *Complacency is the enemy of vigilance*

The AG's paper begins (p2) by stating that 'the Australian public sector is consistently ranked as a low corruption jurisdiction and it is generally accepted that there is no evidence of systemic or endemic integrity issues in the federal public sector.'

While Australia's Corruption Perception Index (CPI) ranking has not changed over the last 3 years, the country was 9<sup>th</sup> in 2013 and in 2019 remains low at 13<sup>th</sup>. It is important to note that Transparency International's CPI is inevitably a lagging indicator and that sometimes a perception of low corruption is fueled by the failure to prosecute.

Furthermore, there are many areas of corruption risk, especially under the definitions of corrupt conduct, which rightly include abuse of office.

On page 12, the AG's proposal paper claims to superiority over state models:

The CIC model avoids a number of deficiencies that have emerged from the experience of established state anti-corruption commissions, like the NSW ICAC and Western Australian Corruption and Crime Commission.

The states have had long experience in integrity and anti-corruption measures and have achieved international renown. The Fitzgerald reforms inspired the concepts of an 'ethics regime,' 'ethics infrastructure,' 'integrity system'<sup>10</sup> and 'integrity framework' the term used in the paper. Experts with considerable experience in these areas see glaring deficiencies in the model suggested by this proposal. Indeed, as emphasized above, the changes seem to reflect attempts to hobble bodies like the CIC rather than introduce reforms to ensure it is an effective national integrity commission.

### **Conclusion: remembering the Open Government Partnership**

The ART concludes this submission by drawing the attention of the A-G's Department to the multilateral Open Government Partnership, to which Australia is a signatory.

It is a multi-stakeholder partnership between governments and civil society. As explained on the Open Government Partnership Australia website, 'At the heart of open government are the ideas of transparency, participation and accountability'.

The CIC model and the consultation process to date, fails to respect Australia's commitment to the Open Government Partnership. The PSD does not provide the level of transparency and public accountability expected in the Open Government Partnership and the consultation process falls well short of providing participation opportunities designed to allow the public to "influence the workings of government by engaging with public policy processes...". To explain further, the consultation meeting on the proposed CIC model was hosted by the Attorney-General's Department in Melbourne on 24 January 2019, and the date for submissions in response to the Department's paper, outlining details of the model close on 1 February 2019. Prior to this time, AGD did not, to our knowledge, engage in consultations with civil society in the design of a CIC.

At the 24 January consultation meeting, members of civil society were informed by representatives of the A-G's Department that the government was planning to place legislation for the creation of the CIC before the Parliament in the forthcoming two-week sitting, which commences on 11 February 2019. Parliament will not meet again until after the Federal election, which the government has indicated will be held in May this year.

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<sup>10</sup> Sampford coined the term 'ethics regime' in 1991 that was picked up by UK Nolan Committee in 1995. The OECD picked up the idea and renamed it an 'Ethics Infrastructure' in 1997 and Transparency International's first CEO (Jeremy Pope) called it an 'Integrity System'

At the same meeting civil society members were informed that there are some elements of the CIC that are firm. In other words, will not be subject to change. They include the divided model and the different powers to be granted to the PSD and the LED.

Regrettably, members of civil society, including experts with deep experience of the workings of State anticorruption bodies, have not been involved in meaningful consultation on an issue critical to addressing loss of trust. This would appear to be the antithesis of what the Open Government Partnership is designed to achieve.

Yours sincerely,

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Professor Charles Samford  
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**ATTACHMENT A**

Investigations into The Australian Criminal Intelligence Commission

The Australian Federal Police (AFP)

The Australian Transaction Reports and Analysis Centre (AUSTRAC)

The Department of Home Affairs

Certain aspects of the Department of Agriculture and Water Resources (DAWR)

Australian Competition and Consumer Commission (ACCC)

Australian Prudential Regulations Authority (APRA)

Australian Securities and Investment Commission (ASIC) Australian Taxation Office (ATO)

## **ATTACHMENT B**

### **Law Enforcement Division**

Will be given the power to:

Compel the production of documents

Question people

Hold public and private hearings

Arrest

Enter/search premises

Seize evidence

Undertake controlled operations and assumed identities

Undertake integrity testing

### **Public Sector Division**

Will have the power to:

Compel the production of documents

Question people

Hold private hearings

Enter and search premises

The proposed model specifically states that 'the public sector division **will not** (our emphasis) be able to:

- exercise arrest warrants
- hold public hearings; or
- make findings of corruption, criminal conduct or misconduct at large'