March 2019

Submission – Commonwealth Integrity Commission consultation

Mr Kevin Lindeberg

This submission has been redacted, in accordance with the approach outlined on the Attorney-General's Department's website here: https://www.ag.gov.au/Consultations/Pages/commonwealth-integrity-commission.aspx.
PUBLIC SUBMISSION

COMMENTARY on the ESTABLISHMENT of a

COMMONWEALTH INTEGRITY COMMISSION

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1 FEBRUARY 2019
1 February 2019

The Hon Christian Porter MP
Attorney-General
Attorney-General’s Department
Robert Garran Office - 3-5 National Circuit
BARTON ACT 2600

Dear Attorney-General

RE: PUBLIC CONSULTATION ON A COMMONWEALTH INTEGRITY COMMISSION

At your public invitation, please find my public contribution dated 1 February 2019 plus its attachments lodged in the public and national interest.

I invite your and the Advisory Panel’s full and careful consideration of their relevant contents.

As you will see, I come to this important public policy matter as the whistleblower in “the Heiner affair”. I do so in good faith.

I may be stating the obvious but it is whistleblowers who are the real risk-takers in this treacherous public policy area, not well-intentioned integrity commission advocates belonging to the vocal retired judges/academia commentariat. Hence, my highly relevant whistleblowing experiences and lessons have been used throughout my contribution to achieve a better outcome for everyone.

Should extra supporting material be required, then I would be happy to provide it under the appropriate protections or to appear and answer questions in an authorised public forum, under oath if necessary.

My contribution may be treated as being public. Its ultimate publication shall naturally fall within your authority as Attorney-General.

Yours sincerely

KEVIN LINDEBERG
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CONSULTATION PARAMETERS

On 13 December 2018, the Australian Government announced that it will establish a Commonwealth Integrity Commission ("CIC") to strengthen integrity arrangements across the federal public sector.

The CIC will be a centralised, specialist centre for the investigation of corruption in the public sector. It will also work with agencies to build resilience to corruption and bolster agency capability to detect, deter and investigate corrupt conduct.

The CIC will be established as an independent statutory agency, led by a commissioner and two deputy commissioners. The CIC will comprise:

- a law enforcement integrity division – this will have the same functions and powers as the current Australian Commission for Law Enforcement Integrity, but with a broader jurisdiction
- a public sector integrity division – this will investigate alleged criminal corruption involving government departments and their staff, parliamentarians and their staff, the staff of federal judicial officers, and in appropriate circumstances, recipients of Commonwealth funds.

Consultation paper – A Commonwealth Integrity Commission – proposed reforms [PDF 731KB]

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EXPERT ADVISORY PANEL

On 18 December 2018, the Commonwealth Attorney-General, the Hon Christian Porter MP, announced that a panel of experts will directly advise the Federal Government on the development of legislation for the CIC. These designated experts are:

- Ms Margaret Cunneen SC;
- Mr Mal Wauchope AO; and
- Mr Mick Keelty AO APM.

It is anticipated that this expert panel (as well as Parliament and the general public) shall have unfettered access to this public submission in order to freely draw on its relevant lessons in the national interest so they are never repeated at a Commonwealth level.

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GLOSSARY

CIC Commonwealth Integrity Commission
CSLS Caxton Street Legal Service
CJC Criminal Justice Commission
CMC Crime and Misconduct Commission
CCC Crime and Corruption Commission
DFSAIA Department of Family Services and Aboriginal and Islanders Affairs
JOYDC John Oxley Youth Detention Centre
PID Public Interest Disclosure
QCPCI Queensland Child Protection Commission of Inquiry
QCC Queensland Crime Commission
QPOA Queensland Professional Officers Association, Union of Employees
QTU Queensland Teachers’ Union
SSCLG Senate Select Committee on the Lindeberg Grievance
SSCENIC Senate Select Committee on the Establishment of a National Integrity Commission
SSCPIW Senate Select Committee on Public Interest Whistleblowing
SSCUWC Senate Select Committee on Unresolved Whistleblower Cases
The Audit The Rofe QC Audit of the Heiner Affair

CASES CITED

A v Hayden (1984) CLR 532

Addis v Crocker [1961] 1QB 11

Ainsworth and Another v Criminal Justice Commission (1992) 175 CLR 564 9 April 1992

Commonwealth v Fairfax and Sons Ltd [1980] HCA 44

Eastman v Director of Public Prosecutions [2014] ACTSCFC 1

Ebner v The Official Trustee in Bankruptcy [2000] HCA 63

FAI Insurances Ltd v Winneke (1982) 151 CLR 342

Giannarelli v Wraith (1988) 165 CLR

Gribbin & Anor v Fingleton [2002] QSC 390

Horne V Barber (1920) 27CL R494;

Kable v Director of Public Prosecutions (NSW) [1996] HCA 24;

Leeth v Commonwealth (1992) 177 CLR 455 p487;
1. **RECOMMENDATIONS:**

**RECOMMENDATION II:** That a stand-alone independent Whistleblowers’ Protection Authority, presided over by a suitably qualified commissioner, be established under its own legislation whose statutory remit shall be:

(a) to solely protect the interests of whistleblowers from reprisal;

(b) to have confidential access to records recovered, used and generated by the CIC in respect of a whistleblower’s PID as a check and balance regarding the thoroughness of the investigatory process and outcome on the whistleblower’s behalf; and

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1 [http://www.heineraffair.info/main.html](http://www.heineraffair.info/main.html)
(c) to report on its activities on a regular scheduled basis to the oversight CIC Parliamentary Committee in order to be held to account for its actions on behalf of the Federal Parliament and Australian people.

RECOMMENDATION III: That the CIC be fully oversighted by a 4-member Government and Opposition Parliamentary Committee drawn from the ranks of their respective senior Senators with legal practitioner experience or the like, and such a Committee shall:

(a) be bipartisan in all its decision outcomes, and if and when a deadlock occurs, shall, in the first instance, report said deadlock to the Commonwealth Attorney-General and Opposition Shadow Attorney-General to resolve the deadlock, but if unsuccessful, shall deliver a report to both Houses (via the Speaker and President) for tabling, consideration and resolution;

(b) function in continuum up to and until its new and/or refreshed membership has been appointed/confirmed by the new Parliament after each federal election;

(c) have its Committee Senators remunerated at the same level as a Federal Minister of the Crown for the duration of their service on the oversight Committee, and who shall not be permitted to serve on any other parliamentary committee at the same time;

(d) require that its Committee Senators, over and above any other oath/affirmation required on re-election before sitting in the Senate, additionally swear an oath or make an affirmation before the assembled Senate (or the Governor-General) that he/she shall faithfully and impartially uphold the provisions of the CIC Act without fear or favour in respect of their oversight duties;

(e) have the professional assistance of a parliamentary commissioner/inspector, suitably qualified at law, of high community and professional standing and integrity, who shall be legislated with full authority to do such things as he/she may consider necessary to investigate bipartisan remits from the oversight committee as it sees fit from time to time, and/or to independently receive and investigate upon his/her discretion complaints of suspected corrupt conduct received from the public, and make a report on same to either the oversight committee, parliament, police or Director of Public Prosecutions as he/she see fit and proper to do in the public interest;

(f) have a committee secretariat drawn from the Senate Secretariat (as well from House of Representatives Secretariat) of suitably qualified senior public officials;

(g) engage external advice from whatever source when deemed necessary in order to diligently and professionally perform its watchdog role over the CIC; and

(h) given that its deliberations concern criminal justice matters which may impinge on individual liberties, it shall be subject to judicial review by the Federal and High Court of Australia, and may not rely on Article 9 of the Bill of Rights 1689 to refuse to not answer questions.

RECOMMENDATION IV: That a CIC shall:

(a) in all its activities act honestly, impartially and in an open and transparent manner. It shall have the standing powers of a Royal Commission.

(b) where practical, not conduct hearings under a cloak of secrecy, especially concerning credible allegations of suspected misconduct involving public officials in high public office. That is, as a first priority, its remit shall always be to protect the integrity of the public office itself, not the

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2 It might be reasonable to believe that such a scenario may never occur but this related ‘open due process’ would act as a powerful incentive on the Committee itself and both sides of politics to put aside their political differences in the national interest and reach a bipartisan approach to the most difficult of circumstances involving allegations of high level corruption whenever they may arise. It is based on the premise to always expect the unexpected. This proposed ‘open due process’ would also instil public confidence that cover-ups by both side of politics, or in concert, would be highly difficult to achieve, and be politically ruinous to public trust when eventually exposed.
reputations of its office holders. It shall do so on the basis that the integrity of the relevant institution, as well as government by the rule of law more generally, is always paramount in a democracy in order to maintain public confidence in the system of government;

(c) afford those public officials under investigation procedural fairness in accord with the Ainsworth principle.\(^3\)

(d) have a presiding commissioner, suitably qualified in law to be an appointee as judge to the High Court of Australia or a State Supreme Court, who shall hold said position for no longer than 5 years, and shall secure bipartisan endorsement of the Prime Minister, Attorney-General, Opposition Leader and Shadow Attorney-General before appointment; and said appointee shall, by law, swear an oath or make an affirmation in public before the Governor-General to impartially, faithfully and fearlessly uphold and enforce the provisions of the CIC Act before taking office; and said commissioner shall be remunerated at the same level as a Justice of the High Court of Australia;

(e) have its performance reviewed triennially at public hearings. This shall include receiving submissions from the public with their submitters invited to speak to their published submissions. Such a review shall be conducted in the same public manner as Estimates Committees acting on behalf of the assembled national Parliament. Such a committee shall have the authority to call the four oversight Committee Senators, as well as the CIC commissioners and other CIC senior staff members as it may deem necessary, to answer questions.

(f) not knowingly mislead Parliament or its oversight committee by either submission or in oral evidence, and if such prima facie act upon referral is as proven by the Senate Privileges Committee upon its independent examination, then such proven act shall be deemed to be sufficient reason to terminate the relevant CIC official’s employment with the CIC forthwith.

RECOMMENDATION V: That the Federal Government, in co-operation with the Federal Opposition and crossbench Members and Senators of the Commonwealth Parliament, set up an Joint House Parliamentary Committee with sufficient powers, including to call for documents, public officials and others to attend and answer questions, to investigate all potential constitutional impacts any such CIC may have on the functions of Constitution and the Reserve Powers of the Crown. Such a Committee may also obtain senior counsel’s advice as it sees fit.

2. FOREWORD

2.1. No reasonable person wants corruption of any sort infecting and affecting the affairs of any Australian government. I believe nor would any reasonable person accept or expect a legislated solution to this ever-lurking corruption problem, namely a trustworthy integrity commission, to turn a blind eye or to cover up corruption in any of the three arms of government when made aware of it, especially if and when the alleged wrongdoing involves those sitting at the very apex of political/administrative/judicial power.

2.2. The real test before the Honourable the Attorney-General, the Advisory Committee and ultimately federal Parliament is not, might I respectfully suggest, whether such a proposed Commonwealth Integrity Commission (“CIC”) can stop and bring to justice those in federal public office who may engage in official misconduct by stealing the occasional box of paperclips, biros or paper, but, on being made aware by a trusting whistleblower, whether the new CIC can and will reliably bring to equal justice those in high public office who break the law.

\(^3\) https://jade.io/article/67669; See Ainsworth and Another v Criminal Justice Commission (1992) 175 CLR 564 9 April 1992
2.3. For example, will a CIC fearlessly apply the law to those at the very apex of power who may have engaged in alleged serious criminality (associated with alleged unconscionable false and deceptive conduct)?

Normally, any such act by a church or individual would rightly be treated as a serious crime. But when it concerns “government”, especially at its apex of power, such legality is tantamount to the Crown itself attacking the administration of justice, public trust in public office, and public confidence in government by the rule of law. It becomes something of a different order.

2.4. Would it not be unthinkable on being made aware of the foresaid conduct for a CIC to then egregiously betray the public trust reposed in it by law, and especially for whistleblowers, by selectively applying the law in an untenable manner to avoid any serious legal, political and constitutional consequences arising against those sitting at the apex of political/administrative/judicial power?

2.5. What would happen then should the all-powerful CIC, through deliberate acts and/or acts of omission, become a self-interested, untrustworthy corrupted player?

2.7. What would happen to society should such an entity (like the CCC/CIC) be so located at the very hub of their criminal justice systems to become a permanent intimidating, untrustworthy fixture-cum-blockage capable of preventing open and accountable government and justice being done, along with its parliamentary oversight body failing in its entrusted watchdog role to rein in or remedy such abuse of power by the CIC due to either idleness, intimidation or being misled by the CIC?

2.8. The other accompanying feature-cum-lesson to be wrestled with is that such a standing national watchdog body will inevitably be given considerable pervasive powers at the time of its establishment. History tells us that it won’t stop at that point. Just as night follows day, claims for more and more intrusive powers over time will eventuate. They will be justified in the CIC’s need to be effective in its ever-expanding role in the fight to eradicate corruption from government which normal policing, more and more, now seems (or as it is so portrayed to the public) incapable of delivering for modern democracies in the 21st century.
2.9. But, as history again shows, we also know that those considerable powers can too easily become oppressive when misused and abused (as is likely to occur at any time, somewhere, somehow unexpectedly), and that the only bulwark to protect society from this danger is personal eternal vigilance linked to a cast iron guarantee that a CIC itself will be wholly trustworthy at all times.

2.10. Hence, this eternal question arises: *Who shall watch these new watchers?* This key question must be addressed honestly in this important national debate if abuse of such powers is to be not just exposed and punished at its bud stage, but made impossible to do in the first place otherwise chaos awaits us all.
7. A NATIONAL DEBATE ON OUR FUTURE GOVERNANCE SYSTEM

7.1. In my opinion, this foreshadowed public policy adoption of a CIC, with its vast forceful reach across the entire community, will not be safely settled unless and until an in-depth national debate takes place. As a nation of educated free citizens in one of the very few continuous democracies on the face of the earth, there should be a consensus in the people regarding how they wish to be governed into the 21st century and beyond.

7.2. For example, do we believe that government *per se* is better, more efficient, less oppressive, more trustworthy and safe being either smaller or larger? Another key question is how much policing is sufficient policing if a harmonious society like ours will prosper and endure without undermining individual freedoms, civil liberties, free speech and other rights because a national CIC, out of control, can become “a big Brother” instrument.

7.3. This essential debate, in my opinion, will fail if it is wilfully denied the benefit of being fully informed about first-hand (especially when bad) experiences of others at the very hands of these integrity commissions whom everyone is supposed to trust, perhaps none more so than will be expected of would-be whistleblowers. Consequently, and more often than not, whistleblowers have very relevant valid tales to tell. They are real risk-takers in this debate. Academics or retired judges are not. Whistleblowers’ valuable tales, gained at considerable, if not immeasurable, personal cost due to their preparedness to make an ethical and determined stand against what might be called ‘evil in the exercise of power’, should never be lost to our nation’s consciousness or to its general betterment and self-

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52 See the Audit Volume VI, Alleged *prima facie* Charge 43; *(See Point 3.4.)*
worth, founded and reliant on our national ethos of ‘a fair go for all’. This submission is such a tale.

Virtue Signalling In The Air

7.5. It cannot pass without being said that there is a great deal of virtue signalling-cum-posturing going on in this debate about how urgent and overdue the need is for a CIC by some of its advocates (of whom many are retired judicial officers) and “integrity cottage-industry” academics. On the other hand, whistleblowers speak and act from the realities of the treacherous, front-line trenches always vulnerable to reprisal, intimidation and isolation. It’s not a happy place.

7.6. In their public support (as they obviously have a right to do), these advocates show a fatal blind spot in their thinking I suggest. The blind spot is that scant to no regard is paid to the possibility that an integrity commission might itself either engage in wrongdoing or become a permanent blockage point within the criminal justice system preventing justice from being done so as to cover up its own past mistakes, abuses of power and biases.

7.7. It follows that the conduct of “integrity commission” public officials themselves must always have the closest of close and fearless scrutiny because they hold positions of very great public trust and power. The stakes are immensely high. I submit therefore that unless a PID impinges on a national security matter involving plots of terrorism et al, public exposure should be the modus operandi at all times because I concur with Jeremy Bentham’s view regarding the administration of justice that “Publicity is the very soul of justice.”


54 18th century legal and social reformer Jeremy Bentham (1748-1832) said the following: “Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against impropriety. It keeps the judge himself, while trying, under trial....in the darkness of secrecy, sinister interest and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice.”
7.8. Valid lessons can be learnt from real-life relevant case studies when they publicly emerge (or are allowed to emerge) so that the same mistakes or corrupt conduct are not repeated, or that, as a deterrent, would-be abusers of power wisely decide to be never-be abusers.

7.9. It is my opinion any deliberate burying of their major mistakes and abuses of power out of a desire to avoid institutional embarrassment or reputational damage achieves nothing in the long run towards the public good and justice. **Secrecy is a fundamentally misguided notion, especially in a democracy which relies on the operational open integrity of its institutions to instil confidence in process and outcome.** Rightly or wrongly, doing things in secret conjures up notions of cover-up and damage control, all of which further erode the role of a free media, public confidence in the system at the very time when being seen to act in an open, fearless and transparent manner would better restore justice and trust, albeit, it is admitted, at some personal short-term hurt to a named public official if later cleared.

7.10. This thrust of openness in a democracy and the necessary vital pursuit of truth and justice finds support in *Addis v Crocker* [1961] 1QB 11 at 28, where Pearce LJ said:

> “...absolute privilege is given to proceedings in courts of law that judges, advocates and witnesses may perform their respective parts free from a deterrent fear of action for defamation. This privilege can create hardship for some persons in particular cases, but it is on balance an advantage to the community.”

The Honour and Duty of being a Public Official

7.11. It seems to be long forgotten by society at large, if not within the ranks of the public sector itself (and needs to be urgently redressed), that it is a very great honour, privilege and high duty when routinely or permanently employed as an elected/appointed public official anywhere in Australia. The high threshold price to be paid in return is complete personal integrity in the performance of one’s public duties to the Australian public in whatever public position held or timeframe, but most especially when in high public office, particularly in the judiciary.

7.12. Therefore, **I believe in public, not secret, hearings in the eradication of corruption, especially if and when it manifests itself as being, or potentially, systemic.** All effort however, as a necessary balance, must be done to ensure procedural fairness for those public officials against whom suspected wrongdoing has been credibly alleged. For example, if perjury occurs to either institute or during a tribunal hearing then the full weight of the law should be brought to bear against the perpetrator, just as abuse of office (e.g. involving a material breach of trust) found against a tribunal official-cum-reviewer (as in being an authorised State/Crown watcher/decision-maker) must also feel the full weight of the law.

7.13. The public must be allowed see that everything is being reasonably, properly and impartially done to protect “the integrity of their/our system of government”, both in the public and national interest. Secrecy breeds contempt. It should always be avoided in a participatory robust democratic society like Australia.

7.14. That is, when credible allegations of suspected official misconduct are handled behind closed doors (and strict confidentiality imposed on the complainant and/or whistleblower) as occurred with me, it **does not** serve the public interest or allay public
suspicion that special deals between “mates” might be done, let alone actually are and/or have been done. Again, in being made public, my submission offers a shocking documented provable insight into such goings-on which some CIC advocates (as well as the media and certain politicians) might deign to scorn or dismiss by suggesting either mischief making, vexatiousness or sheer fantasy on my part without the benefit of reading my submission.

7.15. The reality is that once a new CIC is enmeshed into federal law and our criminal justice system, it will not be easily disestablished or disentangled. It follows that all efforts must ensure that it is set up correctly from the very beginning. To achieve this sound creation threshold, it is imperative that relevant lessons learnt from the past and present are taken on board and not ignored, because too much is at stake. Hopefully, this will ensure repeats not occurring again or, at least, not so regularly in the future juxtaposed to ever-present propensity in the human condition that power corrupts, either by little or large deliberate acts or acts of omission and may happen at the most unexpected of times and places, even in the sanctity of the Cabinet room or Governor-General/Governor’s office.

8. THE CLASH BETWEEN THE CROWN’S RESERVE POWERS AND THE CIC’S ROLE

8.1. By way of an immediate relevant example of highest order, it is submitted that any introduction of a CIC into the legislative fabric of our nation’s governance has the potential to impact adversely on the application of the Constitution as we have known it since federation in 1901, most notably at a time of exceptional crisis (e.g. when a Prime Minister may persist with desisted “warned-of” lawful conduct by the Governor-General warranting his/her dismissal). That is, notwithstanding in the unlikely event of ever suddenly occurring again (since our nation’s last constitutional crisis in 1975), I believe that such a set of circumstances must nevertheless be planned for now and not hubristically ignored now regarding the exercise of the reserve powers of the Crown being invoked as a last resort to return to lawful government, by our constitutional Head of State, the Governor-General.

8.2. Significantly, unlike in 1975, this Vice-Regal Office shall fall now within the jurisdiction of a CIC upon becoming a statutory reality. Consequently, this new intersection-cum-clash of powers may create even further uncertainty at the very time of persistent unlawful governance of the nation when the need for and/or return to certainty and public confidence are at their premiums.

8.4. This is because both Vice-Regal officials (as respective Heads of State), albeit in exceptional circumstances, can and should be expected to be called on to exercise the reserve powers of the Crown should a government persist in unlawful conduct after being warned to desist.
The Mandatory Duty to Refer All Suspected Official Misconduct

8.5. What inevitably arises is a new and binding duty on a Governor/Governor-General when an integrity commission is established. It concerns a mandatory duty on principal officers (as those Vice-Regal are and cannot otherwise legally be in their respective Offices) to refer all suspected official misconduct which may come to their attention to that integrity body to consider, and unless this is done, a serious breach of the law can be made out.

8.6. Notwithstanding the reserve powers of the Crown are not codified (a point of constitutional law with which I agree), this new obligation in a time of great constitutional crisis may tend to, if not emphatically does, make conduct in this high public Office (and on the reporting of public affairs by others) more complex (depending on the circumstances), or more disarmingly simple. That is to say, a CIC/CCC may declare to the Governor-General/Governor that no wrongdoing was found in the referral when in fact it may be an active player in the persistent wrongdoing infecting the government of the day. What happens then? Another question arises: Should such a referral remain secret?

8.7. It is my respectful submission that the Attorney-General (hopefully with the concurrence of the Advisory Panel) should report to parliament that a joint parliamentary committee be urgently established to look closely at this new interface between real competing constitutional/legal powers so that a proper solution, within the confines of the Constitution, may be found before any CIC is established. Our system of government cannot be permitted to have unsolvable gridlocks created in its affairs.
9. CONCLUSION

9.1. To conclude, I remind everyone that my submission is lodged in good faith by me. I do so as an Australian citizen first and a Queenslander second, and in the national interest. This is because I believe that what is at stake are fundamental democratic/rule-of-law national governance issues/principles, nothing less.

9.2. In properly functioning democracies, a free people's right (i.e. "the "governed") to know what their key institutions are doing or have done in their name (i.e. via the acts and acts of omission of their appointed/elected public officials across whole of government especially in matters of great public importance like here) is fundamental. As a general principle questions concerning the integrity of public officials in high public office should never be hidden from scrutiny behind closed doors (save concerning matters of highly sensitive national security such as terrorist plots, foreign invasion et el) or concealed by means of imposing life-long suppression/gagging/confidentiality orders on the aggrieved.

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56 See the Audit Volume IX, Alleged prima facie Charge 67; (See Point 3.4.)
9.3. Based on my experience I firmly believe that any such activity should be addressed in public under privilege (as reflective of our open court system of justice) so that sound judgements, free speech/informed debates can be had based on the whole truth of the matter not just selected bits-and-pieces released here and there at the self-serving whims and convenience of “the governors”.

9.4. Our democracy and its key institutions are, or should be, robust enough to weather those occasional storms of high controversy publicly to better secure public confidence in outcomes and integrity in the operations of our institutions.

Truth is Above Everything

9.6. Our nation may well get a CIC in the near future, but it simply will not work in a trustworthy manner unless it can be held to account. This means eternal vigilance on the part of everyone on the basis that no one is above the law. Therefore, probably and sadly, the nation's best hope to eradicate corruption from government affairs is an endless supply of would-be courageous whistleblowers who believe that Truth matters and is worth the sacrifice.

1 February 2019