

4 February 2019

Via anticorruption@ag.gov.au

Dear Attorney-General

Submission on the proposed Commonwealth Integrity Commission reforms

Thank you for the opportunity to make a submission in response to your Department's consultation paper on the proposed functions and structure of a Commonwealth Integrity Commission.

I welcome the Government's commitment towards enhancing the integrity of the Commonwealth public sector. In the experience of my office, a body responsible for preventing, detecting and responding to corruption across all of the public sector is a necessary pillar of any integrity system. In saying this, I note the valuable work currently being undertaken by a range of integrity bodies described in the consultation paper.

The submission makes some general comments about the proposed integrity commission dual model of oversight, as well as focussing on protection for those who report corruption, whistleblower protection being this office's area of expertise.

I am happy to provide any further information or comment should the Committee desire it.

Yours sincerely

Michael Barnes
NSW Ombudsman

NSW Ombudsman's submission on the proposed Commonwealth Integrity Commission

1. In the experience of my office, a number of key principles underpin an effective integrity commission model:
 - **Independence** from the government of the day or Ministerial direction.
 - Strong government and Parliamentary support, evidenced through an **appropriate level of resourcing**.
 - Taking a **proactive integrity approach** that moves beyond the handling of complaints to the prevention of corruption by instilling a culture of integrity across the public sector, and avoiding a disproportionate emphasis on investigations.¹
 - A **broad jurisdiction** in terms of who it can investigate and for what conduct, if the conduct is serious and systemic.
 - A robust **mandatory reporting system**, whereby the principal officer or other senior officers of public sector agencies are required to notify the Commission of any reasonable suspicions that corruption has occurred.
 - Strong **investigative powers**, including:
 - The ability to initiate investigations on its **own motion**, without need for a referral or complaint.
 - The **coercive powers** of a Royal Commission, including to compel witnesses, require the production of evidence and documents, and to override the privilege against self-incrimination.
 - To hold **public hearings**, if doing so would be in the public interest.
 - To make **public findings** of fact, findings of corrupt conduct and recommendations, including to refer criminal conduct to the Commonwealth Director of Public Prosecutions.
 - Robust **accountability**, including through oversight by Parliament.
2. Establishing a body charged with enhancing the integrity of the public sector and investigating corruption is particularly relevant in an environment where Australia has recently failed to improve on its lowest ranking on Transparency International's corruption perception index² and the need to take serious steps to restore declining trust in government.³
3. While the proposed reforms in relation to law enforcement outlined in the Attorney-General Department's consultation paper on a Commonwealth Integrity Commission (CIC) generally accord with these principles, the same cannot be said for many of the reforms proposed in relation to the public sector division. For example:
 - While a prevention function is outlined, the CIC's proposed 'primary function will be the investigation of serious criminal conduct'. Restricting the jurisdiction of the CIC to corrupt conduct that reaches a criminal threshold is particularly limiting. The division will only be able to initiate an investigation on its own motion when evidence suggests a reasonable suspicion that criminal conduct has occurred. This is likely to exclude from its jurisdiction issues relation to serious conflicts of

¹ AJ Brown, Adam Graycar, Kym Kelly, Ken Coghill, Tim Prenzler & Janet Ransley 2018, [A National Integrity Commission: Options for Australia](#), Griffith University.

² Transparency International 2019, [Corruption Perceptions Index 2018](#).

³ Griffith University and Transparency International Australia 2018, [Global corruption barometer survey results](#).

interest, breach of public duty, nepotism, favouring friends in awarding contracts or grants, misuse of information, etc.

- The division will not have the powers to hold public hearings or make public findings of corruption in order to expose corruption, increase public trust, make investigations more effective by encouraging witnesses to come forward with new evidence, educate the public sector and the community, deter future corruption, and increase the transparency of the investigation.⁴

Dual model of oversight

4. The consultation paper proposes two separate divisions – one based on the existing structure, jurisdiction and powers of the Australian Commissioner of Law Enforcement Integrity, along with a newly created public sector integrity division with more restrictive powers of investigation. The rationale behind this proposed dual model of oversight is that law enforcement agencies, as defined in the consultation paper, exercise the most significant coercive powers; have access to sensitive and highly valuable information; work closely with those they regulate; and, therefore, present a greater corruption risk.
5. Further consideration should be given to whether similar oversight should apply to other Commonwealth government entities that meet these criteria. The proposed dual oversight model also does not seem to account for the corruption risks faced by all organisations, particularly public sector agencies that are accountable to the public.
6. A recent environmental scan by the NSW Independent Commission Against Corruption (ICAC) notes various factors that are associated with the incidence of corrupt conduct, including poor management of information, unfettered discretion or authority, and governance failures. It outlines some of the most common corruption risks, including conflicts of interests, undue influence on decision-making, procurement and contract management, recruitment, regulation and funding non-government organisations.⁵
7. Many of these factors or risks can be found across the spectrum of Commonwealth government entities. For example:
 - In 2017-18 there were 73,458 contracts published on the Commonwealth Government's procurement information system with a combined value of \$71.1 billion. The Department of Defence, an entity that would not be subject to the enhanced investigative powers of the proposed law enforcement division, entered into contracts valued at \$48.5 billion or 68.2% of the total value.⁶
 - A total of 65 Commonwealth entities, spanning 17 portfolios, have a statutory responsibility to administer, monitor or enforce regulation.⁷
 - Other Commonwealth entities, such as the Department of Human Services, have access to extensive, highly sensitive and personal information that can be misused for corrupt purposes.

⁴ The Australia Institute 2018, [Public hearings key to investigating and exposing corruption](#).

⁵ Independent Commission Against Corruption 2018, Corruption and integrity in the NSW public sector: An assessment of current trends and events, available at: <http://www.icac.nsw.gov.au/docman/preventing-corruption/cp-publications-guidelines/5358-corruption-and-integrity-in-the-nsw-public-sector-an-assessment-of-current-trends-and-events/file>.

⁶ Department of Finance 2019, [Statistics of Australian Government procurement contracts](#).

⁷ Department of Jobs and Small Business 2019, *Commonwealth regulatory functions reporting against the regulator performance framework*, available at: <https://www.jobs.gov.au/commonwealth-regulatory-functions-reporting-against-regulator-performance-framework>.

- In 2018, 30 Commonwealth Government entities published grants valued at \$17.5 billion in total.⁸
8. There are also practical difficulties with a dual model of oversight for entities, including a lack of understanding of the different investigative powers that may apply in any given situation. For example, it is not clear why a member of the public is able to allege corruption to the law enforcement division but not to the public sector division. Inconsistencies such as these have the potential to erode public trust in the integrity system.

Sources of corruption allegations and their protection

9. Corruption, by its very nature, is hidden. As the Australian Criminal Intelligence Commission notes, ‘The key challenge in identifying and investigating corruption is that corrupt conduct occurs in secret, between consenting parties who are frequently skilled at deception.’⁹
10. Research has consistently shown that the best source of information concerning serious wrongdoing within an organisation is from insiders, often employees.¹⁰ Without the valuable intelligence that whistleblowers and members of the public provide, the public sector integrity division of the CIC is unlikely to be effective in detecting corruption. For example, in 2015-16, the NSW ICAC received 656 matters via a complaint from a member of the public, 220 matters via a public interest disclosure made by a public official, and 605 matters via a mandatory report from the principal officer of the relevant public authority.¹¹
11. The proposed reforms allow for referrals from other integrity agencies and require mandatory reports from the heads of government entities. My office has observed that such an obligation is not only key for monitoring and intelligence purposes, but also for prompting public sector agencies to embed reporting systems internally. However, the consultation paper suggests that members of the public are only able to make complaints through existing mechanisms that may be referred to the CIC. The consultation paper is silent on the issue of public interest disclosures made by public officials.
12. The referral model proposed may lead to double-handling, unnecessary delays, and breaches of confidentiality leading to a prejudiced investigation. The CIC would also not have access to the valuable intelligence that complaints and disclosures – when considered together – can provide to highlight trends, systemic issues and serious concerns.
13. Any effective complaints handling or whistleblower protection model needs to be easily understood, accessible and navigable to public officials, contractors and suppliers, and other members of the public. Many may not understand why the CIC cannot receive corruption allegations from them directly. This is particularly pertinent

⁸ According to a report of the grants by value published by all active agencies over the period 1 January to 31 December 2018 on the Australian Government [GrantConnect website](#).

⁹ Australian Criminal Intelligence Commission 2018, [Public sector corruption](#).

¹⁰ See, for example, AJ Brown (ed.) 2018, [Whistleblowing: New rules, new policies, new vision](#); Association of Certified Fraud Examiners 2018, [Report to the nations: 2018 global study on occupational fraud and abuse](#); New South Wales Auditor-General 2016, [Fraud survey](#).

¹¹ Independent Commission Against Corruption 2018, [Annual report 2017-18](#).

when the allegations have already been made to the relevant public sector entity, which failed to properly consider them.

14. My office is aware of cases where senior officers who reported corruption as part of their role or while performing their day-to-day functions subsequently faced detriment. In one case, a deputy commissioner was terminated from their employment after making a mandatory notification to the ICAC about the corrupt conduct of another deputy commissioner. In another matter, a chief audit executive had their role downgraded after alleging nepotism by another senior officer that implicated a deputy secretary.
15. The consultation paper proposes a new criminal offence of 'failure to report public sector corruption'. While I strongly support mandatory reporting regimes, any requirement to report must be married with robust legal protections for those who do. This related issue, and whistleblower protection generally, is a major gap in the consultation paper. Given the essential service whistleblowers perform in our society, any proposed reforms should ensure that they do not face harm or detriment for speaking up about corruption.