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Ms Sophie Dunstone
Committee Secretary
Senate Select Committee on a National Integrity Commission
Parliament House
CANBERRA ACT 2600

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

Dear Ms Dunstone

NSW Ombudsman submission to the Select Committee on a National Integrity Commission

Thank you for the opportunity to make this submission to the Committee.

I put forward two issues for the Committee's consideration:

1. the relationship between integrity/anti-corruption commissions and public sector whistleblowing
2. the powers needed for an integrity commission to effectively handle allegations and complaints that do not warrant investigation.

1. Public sector whistleblowers

Part of the Committee's terms of reference is:

- a. *the adequacy of the Australia government's ... framework in addressing all facets of ... Corruption and misconduct, with reference to:*
 - i. *the effectiveness of the current federal and state/territory agencies and commissions in preventing, investigating and prosecuting corruption and misconduct.*

My submission relates to the effectiveness of the framework in NSW, which has a dedicated anti-corruption body and public sector whistleblowing legislation, in encouraging and supporting public servants who wish to report corruption they have witnessed, suspect, or may be involved in.

Let me first give some background about our relevant expertise.

The NSW Ombudsman has statutory functions under the *Public Interest Disclosures Act 1994* (NSW). This Act establishes a framework for NSW public sector agencies to receive, manage and take actions in response to internal disclosures from staff about a range of wrong conduct, including corruption, maladministration and substantial waste within government. One of our responsibilities is to compile statistical information reported to us by agencies about their activities relating to public interest disclosures, and reporting the results to Parliament.

The Act also provides that public interest disclosures may be made to a watchdog body outside the agency of concern. For example, the NSW Independent Commission Against Corruption (NSW ICAC) receives public interest disclosures about corruption, the NSW Ombudsman receives disclosures about maladministration, and the NSW Auditor-General receives disclosures about serious and substantial waste. The NSW Ombudsman compiles and publicly reports statistical information about disclosures made to the watchdog bodies.

What the statistics appear to show

Firstly, the statistics appear to show that a high proportion of disclosures made by public sector whistleblowers in those jurisdictions with a statutory whistleblowing scheme and a dedicated anti-corruption watchdog are about corrupt conduct.

In the five years since our functions began, the statistics have consistently shown that a high percentage of whistleblowers from the NSW public sector make allegations of corrupt conduct, compared with other issues of concern. In our most recent annual report about this function,¹ we reported that 78% of public interest disclosures made to investigating authorities during a 12 month period were made to the NSW ICAC (see page 33). Similarly, 85% of disclosures received by public authorities from or about their own staff alleged corrupt conduct (see page 29).

An equivalent proportion of public interest disclosures in Queensland during the 2015-16 financial year concerned corrupt conduct (87.9%).²

We have not done an in-depth comparative analysis of the effectiveness of the statutory framework for whistleblowers in the Commonwealth public service³ in facilitating the reporting of suspected corruption to heads of agencies or to the relevant watchdog bodies, such as the Australian Commission for Law Enforcement Integrity (ACLEI), the Commonwealth Ombudsman and the Australian Federal Police. There are also some limitations to drawing comparisons arising from differences in the categories of conduct that can be reported under the various public interest disclosure schemes. It can nonetheless be

¹ NSW Ombudsman, Oversight of the *Public Interest Disclosures Act 1994*, Annual Report 2015 – 2016, March 2016. Our five Public Interest Disclosures Act annual reports are available on our website at <http://www.ombo.nsw.gov.au/news-and-publications/publications/annual-reports/public-interest-disclosures>.

² Queensland Ombudsman, Annual report 2015-16, p.66, available at <https://www.ombudsman.qld.gov.au/about-us/corporate-documents/annual-report>.

³ *Public Interest Disclosure Act 2013 (Cth)*

observed that during the 2015-16 financial year, only 10.7% of the conduct disclosed through the Commonwealth scheme could be described as corrupt conduct.⁴ Interestingly, ACLEI received no such disclosures.⁵ Of those received by the AFP, only 5% related to corrupt conduct⁶ and it appears that these were about the AFP itself, not disclosures received in its capacity as a law enforcement agency.⁷

Secondly, the comparative statistics appear to show that public interest disclosures by public servants may be more fruitful than other disclosures in uncovering evidence of corruption. For example, statistical information from the latest annual report from the NSW ICAC⁸ indicates that public interest disclosures are more likely to lead to an ICAC investigation than other sources of intelligence/complaints. As the table below shows, 3.18% of public interest disclosures resulted in an investigation, compared to 1.98% of complaints from members of the public.

Table: Analysis of matters resulting in investigation

| | Complaints from members of the public (s10, ICAC Act) | Public interest disclosures | Mandatory notifications from principal officers (s11, ICAC Act) |
|--|--|------------------------------------|--|
| Total number of matters | 656 | 220 | 605 |
| Number of investigations | 13 | 7 | 16 |
| Proportion of matters that led to an investigation | 1.98% | 3.18% | 2.64% |

Information from Queensland tells a similar story. In 2015-16, 46.6% of public interest disclosures under the State scheme (mostly by public sector employees) were substantiated and an additional 10.4% were partially substantiated.⁹

Observations

It is possible that the existence of a dedicated integrity/anti-corruption body, combined with a statutory framework that establishes a clear line of reporting for public sector whistleblowers, works to encourage and support the reporting of corruption by those who witness it. However, similar goals might be achieved without establishing a new body, if underlying barriers to

⁴ 4% conduct engaged in for the purpose of corruption, 3% abuse of public office, 2% perversion of the course of justice and 2% abuse of public trust. Commonwealth Ombudsman, Annual report 2015-16, p.73, available at http://www.ombudsman.gov.au/_data/assets/pdf_file/0022/41584/ombudsman-annual-report15-16.pdf.

⁵ Commonwealth Ombudsman, Annual report 2015-16, p.86.

⁶ Commonwealth Ombudsman, Annual report 2015-16, p.82.

⁷ On page 81 of the Commonwealth Ombudsman, Annual report 2015-16, there is a footnote making it clear that the disclosures received by the Commonwealth Ombudsman were about other agencies. The absence of such a footnote for the AFP seems to indicate the disclosures received by the AFP were about AFP staff.

⁸ ICAC annual report 2015-16, pp.15 & 94, available at: <http://www.icac.nsw.gov.au/docman/about-the-icac/corporate-reporting/4901-annual-report-2015-16-final/file>.

⁹ Queensland Ombudsman, Annual report 2015-16, p.70.

complaining are overcome. For example, educating public servants precisely where to report corruption will assist. This educative function appears to be part of the existing responsibility of the Commonwealth Ombudsman.

It is also important to ensure there is effective communication with public servants after they have made a disclosure, and that this is a scheme requirement. This helps build broader community confidence that disclosures, once made, will be responded to in a fair and transparent way. A dedicated integrity/anti-corruption body is not the only way of achieving this result, but it can be an effective way of doing so by establishing a clear and straightforward communication system and education for the public service about public interest disclosures.

An interesting element of the anti-corruption framework in NSW, Queensland and Victoria is a system of mandatory reporting by heads of agencies.¹⁰ In NSW, police officers also are mandatorily required to report wrongdoing.¹¹ Research shows that an employee's belief that their role requires them to address wrongdoing often leads them to do it.¹² When employees generally are asked why they reported misconduct, the perception that it was their duty or legal responsibility to do so were important considerations.¹³ Mandatory reporting has a flow-on effect on cultures within organisations. By embedding this requirement in law, the government sends a message that building an integrity culture is mandatory, not discretionary, and public sector leaders must know what is happening in their agency.¹⁴ Public officials may be more likely to understand what constitutes corrupt conduct, because of educational activities undertaken in-house. Systems and processes for the reporting of corrupt activities may also be more embedded within the agency.

¹⁰ *Independent Commission Against Corruption Act 1988 (NSW)*, s. 11; *Crime and Corruption Act 2001 (Qld)*, ss. 38 and 40; *Independent Broad-Based Anti-Corruption Commission Act 2011 (Vic)*, s. 57.

¹¹ *Police Regulation 2015 (NSW)*, clause 50.

¹² Mesmer-Magnus, J.R. & Viswesvaran, C. (2005), 'Whistleblowing in organisations: An examination of correlates of whistleblowing intentions, actions, and retaliation', *Journal of Business Ethics*, vol.62, no.3, pp.277-297; Miceli, M.P., Dozier, J.B. & Near, J.P. (1991), 'Blowing the whistle on data-fudging: A controlled field experiment', *Journal of Applied Social Psychology*, vol.21, pp.301-325; Miceli, M.P. & Near, J.P. (2005), 'Standing up or standing by: what predicts blowing the whistle on organisational wrongdoing?', *Research in Personnel and Human Resource Management*, vol.24, pp.95-136; Near, J.P. & Miceli, M.P. (1996), 'Whistle-blowing: myth and reality', *Journal of Management*, vol.22, no.3, pp.507-526; Victor, B., Trevino, L.K. & Shapiro, D.L. (1993), 'Peer reporting of unethical behavior: The influence of justice evaluations and social context factors', *Journal of Business Ethics*, vol.12, no.4, pp.253-263.

¹³ Miceli, M.P., Dozier, J.B. & Near, J.P. (1991), 'Blowing the whistle on data-fudging: A controlled field experiment', *Journal of Applied Social Psychology*, vol.21, pp.301-325; Wortley, R., & Cassematis, P. & Donkin, M. (2008), 'Who blows the whistle, who doesn't and why?', in A.J. Brown (ed), *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, Canberra: ANU E Press, pp.53-82.

¹⁴ Chris Eccles, *Preventing corruption and building integrity through mandatory notifications*, viewed on 27 April 2017, available at http://www.ibac.vic.gov.au/publications-and-resources/ibac-insights/edition-11/preventing-corruption-and-building-integrity-through-mandatory-notifications?utm_medium=email&utm_campaign=IBAC%20Insights%20issue%2011%20%2027%20April%202017&utm_content=IBAC%20Insights%20issue%2011%20%2027%20April%202017+CID_50eb6044f7f9b58833b9c3c7ea757ed6&utm_source=Campaign%20monitor&utm_term=read%20more.

There are examples of a similar belief in the private sector that corruption – something that by nature occurs in secret – is more likely to be uncovered if there is an organisational culture that supports reporting. Sometimes the people who notice fraud will be the co-workers of a perpetrator.

Some private sector organisations vulnerable to fraud have established telephone hotlines where people, including staff, can anonymously pass on tips about suspicious activity involving fraud. The Association of Certified Fraud Examiners (ACFE) found ‘tips’ are the number one method for detecting fraud, accounting for 42% of initial reports. In fact, the ACFE found that organisations with a hotline typically cut their fraud by 60%. Organisations without a hotline lost an average of \$250,000 to fraud while those with a hotline lost \$100,000.¹⁵

The encouragement for people to report has been taken a step further in some US laws that provide a financial reward to a person (often a staff member) who does so. For example, a US Federal law passed in 2010, the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, s 922, provides that the Securities and Exchange Commission can pay an award to an eligible whistleblower who voluntarily provides information about fraud that leads to a successful enforcement action that yields monetary sanctions of over \$1 million. The whistleblower can be awarded between 10 and 30% of the total fines collected.

Australia has a much smaller population. It is not within our experience to speculate whether such initiatives could work here. However, one advantage of having a national integrity commission could be that responsibility for innovation in corruption prevention strategies and building resistance to corruption would be centralised, enabling a depth of knowledge and expertise to be built over time.

2. Powers to handle complaints and allegations

The Committee’s terms of reference also include the following:

b. whether a national integrity commission should be established to address ... corruption and misconduct, with reference to:

- ii. the legislative and regulatory powers required by any national integrity commission to enable effective operation.*

A national integrity commission must have the necessary powers and tools to manage their workflow. A key practical consideration for any complaint handling body is triaging the contacts they receive.

¹⁵ Association of Certified Fraud Examiners, 2008, *Report to the nations on occupational fraud and abuse*.

In the 2015-16 financial year, the NSW Ombudsman's office declined 65% of complaints made about public sector agencies after assessment.¹⁶ Most of the other complaints were resolved by giving advice, or negotiating a resolution with the agency. Only 3% of complaints proceeded to formal investigation. Of the decisions made by the NSW ICAC assessment panel that year, 80% were to close a matter without referral internally or externally, and only 2% (41 matters) were formally investigated.¹⁷

There are many and varied reasons complaints are dealt with in this way, including misdirected complaints, complaints that can be resolved by providing the complainant with an explanation, complaints that the agency should be given an opportunity to deal with first, complaints resulting from personal grievances, and those arising from a misunderstanding about the motivations behind government agency decisions.

Consideration should be given to providing any new integrity commission with the following discretionary powers:

- a) Discretion to decline a complaint/notification after assessment – see, for example, s 13(4) of the *Ombudsman Act 1976* (NSW), which empowers the Ombudsman to do so, having regard to such matters as the Ombudsman thinks fit.
- b) Power to directly refer a complaint to a different agency. A statutory referral power overcomes the obstacle that privacy legislation poses to personal information being shared without the express consent of the person concerned, which can impede the effective investigation of a matter that a person has referred to a government agency.
- c) Power to require that another agency to which a matter has been referred for investigation provides a follow-up report to the integrity commission – see, for example, ss. 53 and 54 of the *Independent Commission Against Corruption Act 1988* (NSW).
- d) Power to make preliminary inquiries or otherwise seek information from other agencies to gain a fuller understanding of the issues – see, for example, s 13AA of the *Ombudsman Act 1974* (NSW) and ss. 59A and 59B of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).
- e) Power to make suggestions and comments to agencies, on the basis of the information collected using the preliminary inquiries power (rather than the exercise of investigative powers), for the purposes of resolving or otherwise dealing with a complaint, or drawing the agency's attention to risks of corruption or improvements they could make to be less exposed to corruption – see, for example, s 31AC of the *Ombudsman Act 1974* (NSW).

¹⁶ 3,216 of a total of 4,962 were declined after assessment. NSW Ombudsman, Annual Report 2015-16, p. 170, available at http://www.ombo.nsw.gov.au/data/assets/pdf_file/0005/38498/NSW-Ombudsman_2015-16_Annual-Report.pdf.

¹⁷ ICAC annual report 2015-16, p. 23, available at: <http://www.icac.nsw.gov.au/docman/about-the-icac/corporate-reporting/4901-annual-report-2015-16-final/file>.

Powers of that kind can be critical to the effective management of workflow and can also play a significant role in building and fostering trust in government institutions. The absence of such powers to resolve complaints in a practical fashion, without formal investigation, can leave complainants less trusting of the system overall. For example, if an integrity commission is not empowered to explain a misunderstanding about the motives of a public sector agency, a complainant may, not unreasonably, be left with an impression that the commission is an executive government agency that is not committed to uncovering corruption.

Principles of good administration, including the obligation to provide reasons for decision, assure a level of customer service to complainants, and should become part of the culture of a national integrity commission. An allied consideration, based on NSW Ombudsman experience, is that people who complain about corruption may have underlying emotional needs or expectations that also need to be addressed. Their experience or interests may be intertwined with the information they are reporting. Consequently, a new integrity commission should have the appropriate powers and skills to enable it to take actions and handle complaints and information received in a way that builds trust in government overall.

The power to work constructively with agencies, without having to undertake investigations, is also central to fostering healthy, corruption-resistant cultures across the agencies within the commission's jurisdiction.

I trust that this submission may assist the Committee in its deliberations about this important issue.

Yours sincerely

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Acting NSW Ombudsman

27 April 2017