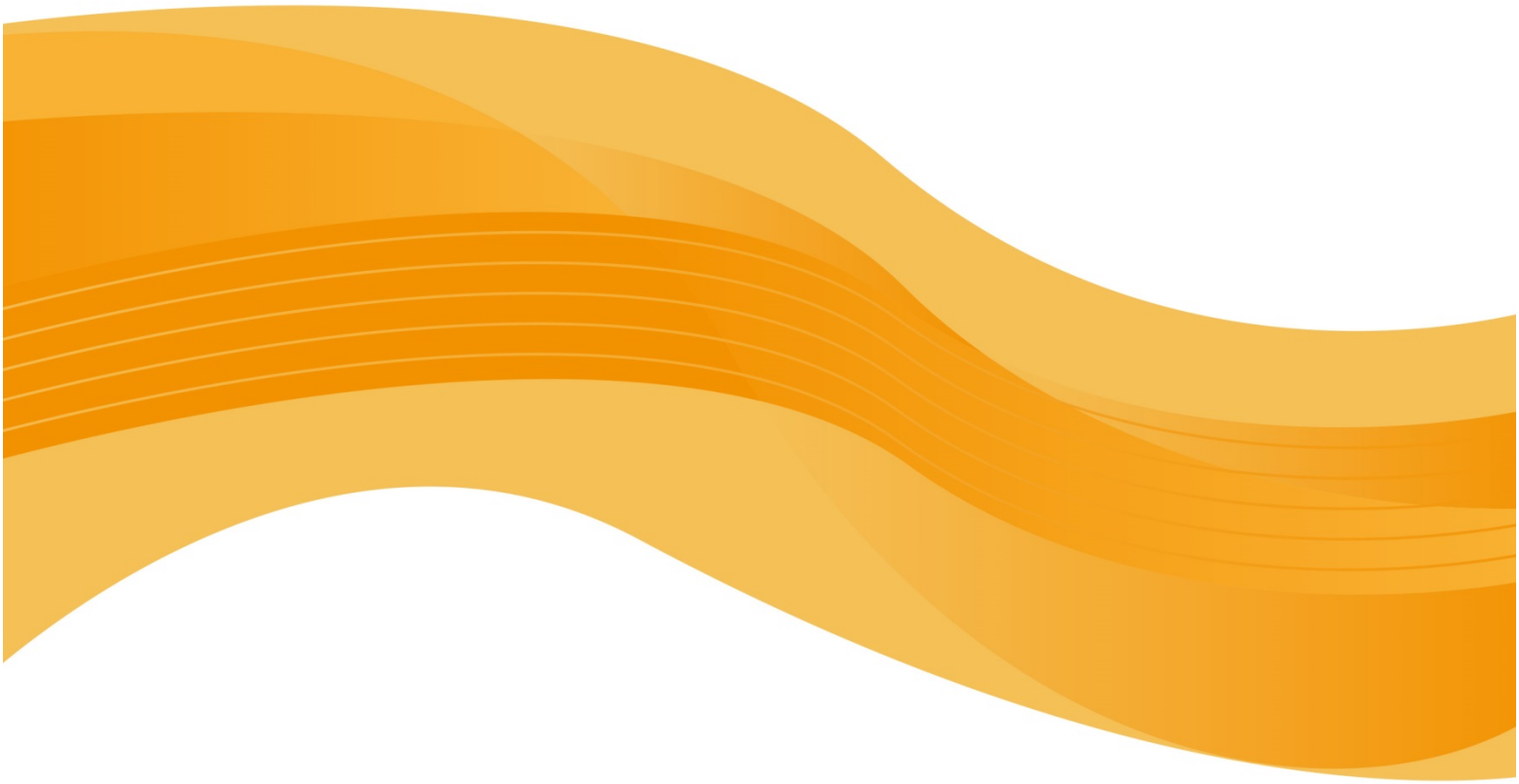
ACTU submission to the Senate Select Committee on the establishment of a National Integrity Commission

2 May 2016



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Introduction

1. The Australian Council of Trade Unions ('ACTU') is pleased to make a submission to this Inquiry. The ACTU is the peak body representing almost 2 million working Australians. We strongly support the creation of a Federal Anti-Corruption Body, such as a National Integrity Commission.

2. The hallmark of corrupt conduct, as commonly understood, involves the use of ones position or authority for a personal gain (or for the personal gain or another person). Accepting that our system of laws ascribes a persona to corporations - if one adopts the view that what distinguishes corrupt behavior is misuse, or abuse, of power - one must also accept that corporations can behave corruptly or be the beneficiaries of corruption. On that wider conception, there would, for example, be some instances of abuse of market power, breaches of consumer safety guarantees, insider trading, misleading and deceptive conduct, and worker exploitation that might be considered corrupt behaviours which not only individuals but also a corporation itself are implicated in.

3. However, this is not a conception of corruption that is popular. Too often, we limit discussion of corruption to bribes or other inducements flowing to persons in public office. This limited sphere is certainly the pre-occupation of most “anti-corruption” agencies in existence in Australia today. There is however no such agency with even that scope of activity that directs it attention to the whole of the Commonwealth public sector. Both of these things must change.

State Anti-Corruption bodies

4. There are a number of agencies operating in the "anti corruption" space in Australia already, albeit within functional or operational boundaries that have left open the gaps currently evident. The agencies, at the broadest level, have more in common than that which distinguishes them. At the more detailed level, there are a numerous differences which may be quite significant.

5. The New South Wales *Independent Commission Against Corruption* ('*ICAC*') is focused on the investigation of corruption by and of public officials as well as education about corruption prevention, detection and related matters. Its activities are largely determined by the independent Commissioner and Assistant Commissioners appointed to it. The definitions in the *Independent Commission Against Corruption Act* 1988 (NSW) ('*ICAC Act*') of the conduct which is to be investigated are reasonably expansive but are subject to exemptions which essentially exclude conduct which is not in breach of some pre-existing obligation[1]. Whilst it is empowered to make findings about the occurrence of corrupt conduct and recommending referral to prosecution, on the fact of it ICAC is equally charged with facilitating continuous improvement in reducing the likelihood and opportunity for corrupt conduct[2]. These are laudable objectives and it is regrettable, in this context, that the mere fact of person's attendance before an *ICAC* hearing can be publicly perceived as tarnishing their reputation. Whilst the *ICAC* is empowered to conduct hearings in public, it is not required to[3]. The objectives of transparency are welcome but ultimately public inquiries and the media frenzy that surrounds them can contribute to a risk that a person who is ultimately referred for prosecution may not receive a fair trial (which could result in them never being brought to justice). Much of the remainder of the *ICAC Act* is devoted to its powers and formal matters such as its staffing, oversight, reporting and referrals. It is not unusual, and is good regulatory practice, to permit agencies to refer matters to one another. However the *ICAC Act* goes one step further by permitting ICAC to record its dissatisfaction concerning how a referred agency has dealt with a matter – to the agency, the Minister and ultimately to both houses of the State Parliament[4].

[1] See sections 7-9 of the *ICAC Act*
[2] See sections 13(1)(d)-(k), 13(2)(b)-(c) of the *ICAC Act*
[3] See section 31 of the *ICAC Act.*
[4] See sections 55-77 of the *ICAC Act.*

6. The West Australian system comprises a Corruption and Crime Commission and a Public Sector Commissioner, both of which are allocated functions under the *Corruption, Crime and Misconduct Act* 2003 (WA) ('the *CCM Act*'). The Public Sector Commissioner is charged with investigating "minor misconduct", which includes a broad range of objectively corrupt behaviors engaged in that could support a decision to terminate a person's employment[5]. Whilst not made explicit, the definition of misconduct does seem broad enough to encompass the actions of third parties who influence public officials, but only where there is actually conduct by a public officer in association with it. The objects of the CCM Act are to combat and reduce the incidence of organised crime; and to improve continuously the integrity of, and to reduce the incidence of, misconduct in the public sector[6]. The reference to misconduct as opposed to corruption is expressed by the definition of misconduct extending not only to corrupt behaviours as commonly understood but also to the commission of offences by public officers acting or purporting to act in an official capacity, being offences that are punishable by 2 or more years imprisonment[7]. The functions of the Crime and Misconduct Commission are, much like the case with ICAC, primarily focused on investigations, recommendations (including in relation to prevention) and referrals (including provision of evidence to enforcement agencies). In addition to these functions, the Crime and Misconduct Commission has particular functions in relation to police misconduct, which are focused on prevention, and specialist functions in relation to organised crime. A particularly welcome function is the seemingly incidental function of consulting with public authorities in relation to the prevention of misconduct, ostensibly where it appears to be desirable to do so based on information that has come to it through the performance of its other functions[8]. Like ICAC the Crime and Misconduct Commission can conduct public hearings[9]. It also has a host of powers that permit it to conduct controlled operations and integrity testing, including through the use by its officers of assumed identities, where there is a reasonable basis for doing so.

7. Victoria has relatively recently established the *Independent broad-based anti-corruption commission.* Like ICAC and the *Corruption and Crime Commission*, the Victorian body

[5] See section 4(d) of the CCM Act. Note however that if the conduct described in that subsection is engaged in by certain State or Local Government personnel, or constituted police misconduct, it is excluded from the definition of "minor misconduct" which otherwise would require the conduct to be dealt with by the Public Service Commissioner.
[6] Section 7A of the CCM Act.
[7] Section 4(c) of the CCM Act.
[8] Section 21AB of the CCM Act.
[9] Section 140 of the CCM Act.

('IBAC') is dual purposed at investigating corrupt conduct of various kinds in the public sector and with prevention and education. The corrupt behavior it is entitled to investigate (outside of certain police matters) is restricted to matters that constitute particular offences[10]. Like the NSW ICAC, the conduct captured explicitly includes not just conduct by a public officer, but also by those who seek to influence them[11]. Its investigative powers include the capacity to hold hearings in public, although the default is the case that such hearings are conducted in private.[12] Further, its investigative powers seem less prescriptive and intrusive than apply for the agencies in NSW and WA. In its "Special Report following IBAC's first year of being fully operational"[13], neither of these matters were identified by IBAC as having impacted its effectiveness (although other matters were identified as requiring further consideration by legislators). Like the other agencies, it is also empowered to refer matters to other agencies (along with recommendations) and comment upon their handling of referrals. IBAC has the power to provide reports to parliament on matters relating to the performance of its duties and functions, however there are a number of threshold considerations that are weighted against the public reporting of adverse findings against individuals or public bodies.[14]

8. South Australia's current regime is also relatively new, having commenced operations in September of 2013. It consists of the *Office for Public Integrity* ('Office') and the *Independent Commissioner against Corruption* ('Commissioner'), both established by the *Independent Commissioner Against Corruption Act* 2012 (SA). Under that scheme, the Office for Public Integrity effectively acts as a clearing house for all manner of complaints concerning corruption in public administration, misconduct in public administration and maladministration in public administration, and refers or recommends such complaints to appropriate authorities to investigate or otherwise action. Only complaints concerning corruption in public administration may be investigated by the Commissioner using its full suite of powers. Like the Victorian system these powers include use direct immunities[15] but otherwise permit the material obtained in an investigation to be used by law enforcement

[10] See section 4 and the definition of "relevant offences" in section 3 of the *Independent Broad-based Anti-Corruption Commission Act* 2011 (VIC)
[11] Section 4(1)(a) of the *Independent Broad-based Anti-Corruption Commission Act* 2011 (VIC)
[12] See section 117 of the *Independent Broad-based Anti-Corruption Commission Act* 2011 (VIC)
[13] IBAC, April 2014. Available online: http://www.ibac.vic.gov.au/docs/default-source/special-reports/special_report_-first_year_operational.pdf?sfvrsn=8
[14] See section 162 of the *Independent Broad-based Anti-Corruption Commission Act* 2011 (VIC)
[15] See Schedule 2 to the *Independent Commissioner Against Corruption Act* 2012 (SA)

agencies[16]. Unlike any of the other models discussed above there is no capacity to conduct a public hearing – rather public hearings are preserved only for the prevention, improvement and educational functions of the Commissioner. Corruption in public administration, as defined, includes only criminal conduct of particular kinds however it includes accessorial provisions which bring the involvement of persons outside public office within scope. The Commissioner also has a direct role in the investigation of the lesser prescriptions of misconduct in public administration and maladministration in public administration, however its powers are limited to exercising the powers of the agency that would otherwise itself be charged with dealing with those matters (it equally may refer the matters to those agencies instead and comment on their handling of them)[17]. The public reporting functions of the Commission exclude any material that would identify any particular matter subject of investigation, save for any recommendations it may make about law reform.[18] As with the other bodies, the Commissioner also possesses functions concerning prevention and education.

9. Tasmania is also among the States to have recently revisited the issue of its anti-corruption framework. It too has established an Integrity Commission which is focused on prevention, education and investigation. Its complaints and investigation framework is centered around misconduct defined to include certain corrupt conduct as commonly understood – whether or not it amounts to an offence – as well as breaches of codes of conduct. Importantly, attempts to engage in such misconduct are explicitly covered. There seem to be a number of levels of investigation that might be conducted, and numerous opportunities and decision points with the framework where a complaint may be referred elsewhere or not investigated further. It is entirely unclear why it was considered necessary to have both an "investigation" procedure which includes the taking of evidence as a pre-cursor to an "inquiry" which involves the same and with two layers of filtering and intervention in between (first by a Chief Executive Officer and then by a Board). It certainly does seem that the system is geared toward creating every possible opportunity for a complaint to cease being investigated or referred elsewhere[19]. The inaugural Chief Integrity Commissioner

[16] Section 56A
[17] See sections 24 ad 37
[18] See section 42
[19] See Parts 6-7 of the *Integrity Commission Act* 2009 (TAS).

published an open letter on his departure describing the legislative framework as "manifestly inadequate".[20]

10. The framework in Queensland is highly prescriptive. Its investigative agency is the Crime and Corruption Commission. Its investigative role involves major crime as well as corrupt conduct. The categories of corruption that fall for investigation need not be criminal conduct – disciplinary breaches that could amount to grounds for dismissal may also be pursued[21]. It is also explicit that the conduct of persons who are not public officers may be investigated, provided it has some connection to such an officer. Attempts to engage in such conduct are also captured.[22] The *Crime and Corruption Act* 2001 (QLD) includes a principle of "Devolution" in relation to the corruption function, which favours action in relation to alleged corruption being taken by the agency in which it is alleged to occur[23]. This is supported by powers that enable the Commission to assist such an agency in its investigation of and response to a complaint. The Commission's reports are, broadly made to those agencies who have the capacity to enforce the law in relation to particular public officers, with the exception that the Commission itself is empowered to pursue some disciplinary breaches constituted by corrupt conduct.[24] Like the NSW ICAC, the Commission possesses some covert investigative powers. Hearings may be held in public or in private[25]. Reports following investigations are provided to relevant authorities rather than the public at large[26]. The corruption education and prevention functions are performed by a separate entity, the Queensland Integrity Commissioner.

11. The Northern Territory is reportedly considering and anti-corruption body.[27]

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[20] See http://www.abc.net.au/news/2015-08-07/corruption-watchdog-chief-blasts-tasmanian-government/6680968
[21] Section 15 of the *Crime and Corruption Act* 2001 (QLD)
[22] Section 18 of the *Crime and Corruption Act* 2001 (QLD)
[23] Section 34B of the *Crime and Corruption Act* 2001 (QLD)
[24] Sections 49-50 of the *Crime and Corruption Act* 2001 (QLD)
[25] Section 177 of the *Crime and Corruption Act* 2001 (QLD)
[26] Section 49 of the *Crime and Corruption Act* 2001 (QLD)
[27] http://www.ombudsman.nt.gov.au/news/cain-update-%E2%80%93-12-january-2016

The Commonwealth approach

12. There are a number of Commonwealth mechanisms and agencies that have a role in corruption prevention, however there is a lack of a "one stop shop" to address corruption in the public sector. The Australian Public Service Commission and APS agencies uphold the APS code of conduct, which prohibits corrupt behavior among other things within the public service. This is a deterrent mechanism but is properly understood as an evolution of the disciplinary powers of an employer under the general law. The Commonwealth Fraud Control Framework is a further preventative mechanism, which comprises a positive duty on Commonwealth entities to "take all reasonable measures to prevent, detect and deal with fraud relating to the entity"[28], via a legislative instrument, backed by the *Commonwealth Fraud Control Policy* which is binding on non-corporate Commonwealth entities by virtue of section 21 of the *Public Governance, Performance and Accountability Act* 2013. Guidance in relation to the implementation of these instruments is set via the *Resource Management Guide No. 201 – Preventing, detecting and dealing with fraud*. Collectively these instruments provide a level of protection against some corrupt behavior however their scope is clearly limited.

13. The primary agencies that interface with and have a role in addressing corruption in the Commonwealth Public Sector are the Ombudsman, the Australian National Audit Office and the Australian Commission for Law Enforcement Integrity. The role of each was briefly discussed in a 2011 report of the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity[29]. The Ombudsman's complaint handling and investigative role were seen as having a limiting effect on corruption by preventing broader examples of poor administrative conduct, including misconduct. The Australian National Audit Office, may discover corruption through assisting the Auditor General in the performance of the responsibilities of that office (which include recourse to compulsory information gathering powers), however as at the date of the Joint Committee's report it had apparently not referred any instances of corruption to the Australian Federal Police[30]. The closest thing that the Commonwealth has to a dedicated anti-corruption body is the Australian Commission for Law Enforcement Integrity ('ACLEI').

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[28] *Public Governance, Performance and Accountability Rule* 2014, s. 10
[29] "Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006", Final Report, July 2011.
[30] *Ibid.,* page 42.

14. ACLEI's has the role of investigating corruption within select Commonwealth law enforcement agencies, however not all such agencies are within its jurisdiction (ASIC for example is outside it). It has a suite of coercive investigative powers to draw on[31] and may hold hearings in public or in private[32]. It is duty bound to report on its investigations (generally publicly)[33] and also to provide the evidence obtained during its investigations to authorities where it such evidence would support a prosecution against persons investigated[34]. However, ACLEI may also conduct its investigations in tandem with the agencies in which the corruption was discovered, or in some cases may oversee those investigations[35].

15. ACLEI cannot be characterised as a purely investigative agency. Its other functions reach beyond the particular law enforcement agencies that it is empowered to investigate, and include providing information about corruption more generally.[36] The fruits of the this more general function are evident on ACLEI's website, which for example contains its "anti-corruption toolkit", which although focused on law enforcement agencies, contains a principled based approach to reducing the risk or opportunity for corrupt behavior. ACLEI had in fact proposed in its submission to the Joint Committee inquiry referred to above that it have a greater role in education and prevention of corruption in the public sector generally[37]. Further, it seems that the view of the Joint Committee in an earlier report was that it ought to expand its activities in this regard[38].

16. The *Public Interest Disclosure* regime, comprising the *Public Interest Disclosure* Act 2013 and the *Public Interest Disclosure Standard* 2013, also plays a role in detecting and responding to corruption, by creating a framework in which to report and investigate wrongdoing, and protecting whistleblowers. It too is focused on conduct within the public sector and relies (largely) on disclosure being made within agencies by existing or former officers and staff,

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[31] See Part 9 of the *Law Reform Integrity Commission Act* 2006
[32] See Division 2 of Part 9 of the *Law Reform Integrity Commission Act* 2006
[33] See section 203 of the *Law Reform Integrity Commission Act* 2006
[34] See section 142 of the *Law Reform Integrity Commission Act* 2006
[35] See section 26 of the *Law Reform Integrity Commission Act* 2006.
[36] See section 15(f) of the *Law Reform Integrity Commission Act* 2006
[37] See discussion in chapters 2 and 3 of the Report of the Joint Committee the Australian Commission for Law Enforcement Integrity "Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006", Final Report, July 2011.
[38] See Recommendations 2 and 3 of the "Inquiry into Law Enforcement Integrity Models" report by the Joint Committee on the Australian Commission for Law Enforcement Integrity (February 2009).

about conduct occurring internally within that agency. The conduct of members of Parliament is not within the scope of the regime. Whilst there are some limited circumstances in which the Ombudsman may receive and investigate a disclosure[39], generally disclosures are investigated by the agency concerned. Whilst the legislation provides for the determination of standard procedures across agencies for the investigation of disclosures, this power has not been exercised in a particularly prescriptive manner[40] and accordingly there is scope for a lack of consistency in this regard.

[39] See sections 26(1) and 34 of the *Public Interest Disclosure Act* 2013
[40] See Part 3 of the *Public Interest Disclosure Standard* 2013

Toward a more integrated model

17. We see merit in the ACLEI model however we note the agencies own desire, expressed to and by the Joint Committee, that its investigations arm at least remain focused on law enforcement agencies. Be that as it may, the Joint Committee had expressed the view almost 5 years ago "..that it has received sufficient evidence indicating there is an oversight gap at the Commonwealth level to warrant further examination by this committee or another appropriate body"[41]. This view led the Joint Committee to recommend "..that the Australian Government conduct a review of the Commonwealth integrity system with particular examination of the merits of establishing a Commonwealth integrity Commission with anti-corruption oversight of all Commonwealth public sector agencies, taking into account the need to retain the expertise of ACLEI in the area of law enforcement"[42]. This is a recommendation that ought to be adopted and expanded upon by the present inquiry. A separate broad-based body was also supported at that time by Transparency International, Whistleblowers Australia and the Commonwealth Ombudsman.[43]

18. Each of the established agencies across the country is limited in that they only investigate public sector corruption or misconduct, as variously defined. Only some explicitly allow direct investigation of those persons who influence public sector actors to act corruptly. The lack of coherent a response to corruption and misconduct outside of the public sector is a matter where the Commonwealth might consider regulating. The barrier is certainly not a legal one - the modern view of the corporations power seems to be so broad that it carries with it the power to regulate the persons that a corporation has relationships with and those whose conduct is capable of affecting its activities, functions, relationships or business[44]. The ACTU considers it highly desirable that a framework be established at Commonwealth level that is capable of addressing and preventing corruption in the public sector (including politicians), the private sector and the not for profit sector, including political parties.

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[41] Report of the Joint Committee the Australian Commission for Law Enforcement Integrity "Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006", Final Report, July 2011, Page 49.
[42] *Ibid.,* Recommendation 10
[43] *Ibid.,* pages 44-47.
[44] See *NSW v. The Commonwealth* [2006] HCA 52

19. Whilst it is true to say that specialist regulators exist to enforce the law in various spheres of activity, most with coercive powers of some measure (for example, ASIC, the ACCC and the General Manager of the Fair Work Commission), this is not the same as having an agency focused on wrongdoing at a more base level. An agency with expertise in corruption prevention is an asset not only to the public sector but also to the private sector and the community at large. The public benefit of an agency that had the expertise to train, integrity test and review corruption prevention strategies in any organisation would certainly outweigh any competitive neutrality policy objections that might be raised against it, and there would be cost saving potential if it were obliged by such a policy to charge appropriately for the quality of the services it might perform. This is not to suggest that an investigative function would not also be a central feature of such an agency, however we envisage the investigative function would be one ultimately focused on continuous improvement rather than merely headlining grabbing. Therefore, whist adverse findings might be made in relation to particular individuals and referrals made to appropriate authorities, these would merely be necessary and important steps in serving a function centered on discovering on what might have been done differently at an organisational level (public or private) to prevent or reduce the risk of such conduct occurring. Further, whilst a suite of coercive powers would be necessary, we do not see that public interrogations or the abolition of derivative use immunities would be an essential ingredient in such a function.

20. In addition to prevention and investigation, we see a third and novel role for such an agency, which would involve review and recommendation following investigations and prosecutions. This role would enable to the agency to review the approach adopted in relation to the investigation and prosecution of corruption related laws where the authority concerned had failed to secure the outcome that it had sought, or where the Director of Public Prosecutions had recommended that the matter not be pursued. Such a function could boost the capacity of regulatory agencies collectively over time and may inform the process of law reform. We appreciate that most regulatory agencies likely already conduct debriefings internally in relation to such matters, however these are clearly not an effective way of improving capacity and learning beyond the four walls of the regulator or team concerned. Taking the three functions together provides, in our view, a clear pathway to reducing the incidence of corrupt behavior in the community and improving the efficiency of regulators in responding to it.

21. We are concerned that the current Committee is not the ideal vehicle for fully exploring the matters raised in its terms of reference or in our submission. A double dissolution election may well mean that the Committee is incapable of concluding its inquiry. In our view, it would be desirable if the Australian Law Reform Commission were given the task of a detailed review of anti-corruption approaches in Australia and overseas with a view to recommending a prevention and investigation framework that would serve all sectors of the community.

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