



Law Council
OF AUSTRALIA

National Integrity Commission Inquiry

Select Committee on a National Integrity Commission

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia acknowledges the assistance of its National Criminal Law Committee and the Law Society of New South Wales in the preparation of this submission.

Executive Summary

1. The Law Council of Australia is pleased to provide a further submission to the Senate Select Committee on a National Integrity Commission's (**the Committee**) inquiry into the Establishment of a National Integrity Commission (**NIC**), established on 8 February 2017.
2. The Law Council previously provided a submission to the Committee on 20 April 2016 (**attached**). The Law Council notes that the Committee has access to the evidence and records of its 2016 Inquiry, and that previous submitters should only re-submit to the Committee if they need to update or amend their previous submission or have new information to provide.¹
3. In its previous submission, the Law Council set out four key recommendations, namely:
 - develop a national strategy for addressing corruption through the Council of Australian Governments (**COAG**);
 - undertake a National Integrity System assessment of the nature, extent and impact of corruption in Australia;
 - consider on the basis of the National Integrity System assessment whether the Australian Government should establish a broad-based federal anti-corruption agency; and
 - if a federal NIC is to be established, the scope of the Commission's powers should be based on lessons learned from the experiences of state-based anti-corruption agencies (discussed below) regarding public hearings, evidence gathering, prosecutions, preliminary investigations, jurisdiction, coercive powers, relevant offences, penalty provisions, mandatory reporting requirements, police complaints, protected disclosure, freedom of information, oversight and resourcing.²
4. Relevant to the fourth recommendation above, this submission provides additional information on lessons learned from the experiences of state-based anti-corruption agencies (**ACAs**) since the date of its last submission, as well as addressing some of the matters outlined in the Committee's Interim Report published after that date. To that end, the Law Council makes the following additional recommendations, if a federal NIC is to be established:
 - A deliberate decision should be made about whether the primary focus of any federal NIC should be investigating and exposing corruption, or gathering evidence for the prosecution of corruption offences. If both, then consideration should be given to how any difference in objectives between the federal NIC and the relevant prosecution service will be managed.
 - Appropriate resources should be provided to ensure any federal NIC can proactively share all disclosable information with the relevant prosecutorial service, should it have the capacity to refer matters for prosecution, and

¹ Parliament of Australia, *Select Committee on a National Integrity Commission* (2017) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/National_Integrity_Commission/IntegrityCommissionSen>.

² See Law Council of Australia, *Submission on the Establishment of a National Integrity Commission* (20 April 2016) 3.

consideration should be given to what mechanisms will best ensure that all disclosable information can be shared.

- Any federal NIC should be constituted as a purely investigative body and not be given power to commence prosecutions, except for perjury or failure to attend or be sworn, and any evidence that may support a criminal prosecution should be referred to the relevant prosecutorial service. After a person has been charged with an offence, any federal NIC should not have the power to conduct a compulsory examination of a person on matters the subject of the charge.
- Careful thought should be given to how any federal NIC constituted from the outset, as well as to designing a transparent mechanism for making any necessary adjustments to its functioning following its inception.

Further lessons learned from the experiences of state-based anti-corruption agencies since 20 April 2016

5. The Law Council notes that each of the subheadings in this section corresponds with subheadings in its previous submission dated 20 April 2016. Except where otherwise noted, the sections below should be read as additional to the corresponding sections of the original submission.

Gathering evidence & prosecutions

6. In its previous submission dated 20 April 2016 the Law Council noted that:

If the focus of a NIC is investigative, it follows that close consideration should be given to the manner in which material is generated, and shared with other agencies, to improve the prospects of that material being used to support a criminal prosecution.

For example, in NSW, section 14 of ICAC Act 1988 (NSW) provides that a function of the ICAC should be the gathering and assembling of evidence that may be admissible in the prosecution of a person for a criminal offence.³

7. The submission then noted that careful consideration will need to be given to how the process of a federal NIC gathering evidence under its compulsory powers might impact the admissibility of that evidence in any subsequent criminal prosecution, and therefore the viability of those proceedings.
8. While these remain relevant considerations for any federal NIC with an investigative focus, the role a federal NIC should have in contributing to criminal prosecutions, if any, should be defined.⁴ In particular, it is necessary to consider how any federal NIC tasked with gathering evidence to support successful criminal prosecutions will balance that task with the function of investigating and exposing corruption at the federal level.
9. For example, the NSW Parliament Committee on the Independent Commission against Corruption (**ICAC Committee**) has found that there is considerable public interest in successful prosecutions of persons investigated by the ICAC who have committed criminal offences.⁵ Therefore, it has noted that, if sufficient admissible evidence emerges during the course of an ICAC investigation to successfully prosecute a person for a criminal offence, it could be argued that the ICAC should discontinue its investigation and refer that evidence to the Department of Public Prosecutions (**DPP**) in NSW.⁶
10. However, the ICAC Committee raised the question as to whether, as a matter of policy, the ICAC should do that, given its primary function is to investigate, expose and prevent corrupt conduct in the NSW public sector, while gathering and assembling evidence that

³ Ibid 14 [53] – [54] (paragraph numbers omitted).

⁴ In the case of NSW, the NSW Parliament Committee on the Independent Commission Against Corruption has found that there is considerable public interest in the successful prosecution of persons investigated by ICAC who have committed criminal offences: Committee on the Independent Commission Against Corruption, Parliament of New South Wales, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports* (October 2016) 29 [2.76].

⁵ Ibid.

⁶ Ibid 29 [2.78].

may lead to a criminal prosecution is only a secondary function.⁷ Sometimes, the two functions may be at odds. For example, as a former NSW ICAC Commissioner explained during ICAC Committee hearings, “[for ICAC], corrupt conduct is defined in such a way that it does not necessarily neatly fit into what might be a prosecutable criminal offence”.⁸ The ICAC Committee considered that if the ICAC were to refer sufficient admissible evidence to the DPP as a matter of policy, it would likely require legislative change to its primary functions.⁹

11. Consideration should therefore be given to any potential crossover in roles between a federal NIC as an investigatory body and the Commonwealth DPP as a prosecutorial service. At the state level, the Law Council notes amendments proposed¹⁰ to the *Criminal Procedure Act 1986* (NSW) to give the NSW ICAC powers to commence prosecutions,¹¹ after the NSW Local Court found that it had improperly commenced prosecutions against Ian MacDonald and John Maitland, both subjects of a NSW ICAC investigation, by serving court attendance notices on the men.¹²
12. The Law Council considers that any federal NIC should not have the power to commence prosecutions, with the exception of perjury or failing to attend or be sworn. Its purpose should be a purely investigative, to ensure its independence and efficacy. As has already been discussed, any conduct uncovered during any investigation that may constitute a criminal offence can then be referred to the Commonwealth DPP or other relevant prosecutorial service for prosecution.
13. In addition, once a person has been charged with a criminal offence, the Law Council considers that any federal NIC should not have the power to conduct compulsory examinations of that person on matters relevant to the offence with which they have been charged. This should be the case regardless of whether the charging of the accused arose from a matter referred to the CDPP or other relevant prosecutorial service following a federal NIC investigation, or if the charging of the accused was unrelated to any federal NIC investigation. Ensuring that a person has a meaningful right to avoid self-incrimination when they are subject to criminal proceedings is essential to avoid prejudice to the constitutionally protected right of an accused to a fair trial.¹³

⁷ Ibid 29 [2.76].

⁸ Ibid 29 [2.77].

⁹ Ibid 29 [2.79].

¹⁰ *Courts and other Justice Portfolio Legislation Amendment Bill 2015* (NSW), which following amendment was passed as the *Courts and other Justice Portfolio Legislation Amendment Act 2015 (No 67)* (NSW). The Bill was amended by the NSW Government after its successful passage was risked by opposition in the upper house: see for example New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5767-5790 (Mr David Shoebridge; Rev the Hon Fred Nile).

¹¹ As passed, the amendment reads that “an officer of ICAC does not have the power to commence proceedings for an offence unless the Director of Public Prosecutions has advised the Independent Commission Against Corruption in writing that the proceedings may be commenced by an officer of ICAC”: see *Criminal Procedure Act 1986* (NSW) s 14A(1).

¹² Michaela Whitbourn, “Court rules ICAC invalidly commenced prosecutions against Ian Macdonald and John Maitland over coal exploration licence to Doyles Creek Mining” (22 May 2015) *Sydney Morning Herald* <<http://www.smh.com.au/nsw/court-rules-icac-invalidly-commenced-prosecutions-against-ian-macdonald-and-john-maitland-over-coal-exploration-licence-to-doyles-creek-mining-20150522-gh7czv.html>>.

¹³ See *X7 v Australian Crime Commission* (2013) 248 CLR 92 (French CJ and Crennan JJ). See further Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee on the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015* (7 January 2016) 5-9 <https://www.lawcouncil.asn.au/lawcouncil/images/3090_-_Crimes_Legn_Amdt_Proceeds_of_Crime_and_Othr_Measures_Bill_2015.pdf> for a discussion of the caution that should be exercised and issues that should be considered when crafting measures that risk infringing an accused’s right to a fair trial.

Recommendations:

- **If established, a decision should be made about whether its primary focus should be investigating and exposing corruption, or gathering evidence for the prosecution of corruption offences. If both, then consideration should be given to how any difference in objectives between the federal NIC and the relevant prosecution service will be managed.**
- **Any federal NIC should not have the power to instigate prosecutions for any conduct it has investigated, aside from perjury or failing to attend or be sworn.**
- **After a person has been charged with an offence, any federal NIC should not have the power to conduct a compulsory examination of an accused on matters the subject of the charge.**

Resourcing

14. In its previous submission of 20 April 2016 the Law Council noted that:

So far as obligations of disclosure are concerned, additional resources would be required to ensure that while the prosecutor of any criminal proceedings was not aware of inadmissible material obtained under compulsion through the ACA process, there was an officer within the prosecution service who was cognisant of all material, so as to fulfil any disclosure obligations to the accused person.¹⁴

15. The Law Council emphasises the importance of ensuring sufficient resources are provided so that the prosecutorial office has all evidence relevant to any criminal proceedings. However, it should be clarified that resources should be allocated to ensure a prosecutor of any criminal proceedings is aware of all disclosable material, not just admissible material. Not all disclosable material will necessarily be admissible, as admissible material is that which can be used to support a criminal prosecution, whereas disclosable information is material that might support the prosecution's case or the accused's case.¹⁵

16. For example, the ICAC Committee has been concerned about the ICAC declining to produce compulsory examination material to the DPP that was subject to a non-disclosure order.¹⁶ It also noted that the Magistrate in the NSW Local Court that presided over the unsuccessful prosecution of former SES Commissioner Murray Kear raised concerns that the ICAC had not provided the DPP with potentially exculpatory

¹⁴ Law Council of Australia, *Submission on the Establishment of a National Integrity Commission* (20 April 2016) 20 [92].

¹⁵ See Committee on the Independent Commission Against Corruption, Parliament of New South Wales, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports* (October 2016) 26 [2.61] (citing Mr Lloyd Babb SC, the NSW DPP).

¹⁶ *Ibid* 27 [2.66]-[2.68].

material, before ordering that the ICAC disclose the material to the court,¹⁷ and ultimately clearing Kear of the charge.¹⁸

17. While the Memorandum of Understanding between the ICAC and the DPP (**MOU**) at the time provided that the ICAC should provide all disclosable material to the DPP for indictable offences, Kear was charged with a summary offence. The MOU has since been updated to cover cases involving summary offences and the ICAC Committee has recommended that the MOU be upgraded to the form of legislative provisions.

Recommendation:

- **Appropriate resources should be provided to ensure any federal NIC can proactively share all disclosable information with the relevant prosecutorial service, should it have the capacity to refer matters for prosecution. Consideration should be given to what mechanisms will best ensure that all disclosable information can be shared.**

Public hearings

18. As recommended in its previous submission to this inquiry, the Law Council considers that the approach in Queensland which enables the Crime and Corruption Commission (**CCC**) to conduct private hearings should be the default model adopted in proceedings before any federal NIC. The Law Council also notes support for a default model of private hearings in a discussion paper prepared by Transparency International and Griffith University and presented at the National Integrity Conference 2017 (**Discussion Paper**).¹⁹ The Discussion Paper sets out three additional design features that should accompany any default private hearing model, namely:

- (a) any federal NIC must be able to publicly report the findings that result from any hearing, including findings of serious and systemic corruption and their relevant factual foundations;
- (b) any federal NIC hearings must honour procedural fairness; and
- (c) a new federal NIC have a statutory power of 'follow-up' – that is, the ability to report publicly on the government's compliance (or lack thereof) with past reports and recommendations.²⁰

19. The Law Council considers that these are sensible design features to accompany a default private hearing model, with the proviso that consideration should be given to what standards of procedural fairness would be appropriate to maintain public

¹⁷ See Sharri Markson, "ICAC forced to release evidence on Murray Kear case" *The Australian* (9 February 2016) <<http://www.theaustralian.com.au/national-affairs/state-politics/icac-forced-to-release-evidence-on-murray-kear-case/news-story/4b0dc623ad6fa97fca0df3296e661245>>.

¹⁸ See Michaela Whitbourn, "Criminal charges dismissed against former Commissioner Murray Kear following ICAC probe" *The Sydney Morning Herald* (16 March 2016) <<http://www.smh.com.au/nsw/criminal-charges-dismissed-against-former-ses-commissioner-murray-kear-following-icac-probe-20160316-gnkh8.html>>.

¹⁹ Transparency International and Griffith University, *A federal anti-corruption agency for Australia?* (March 2017) 31 <<http://transparency.org.au/wp-content/uploads/2017/03/Griffith-University-TIA-Discussion-Paper-A-Federal-ICAC-Integrity-of-Purpose-March-2017.pdf>>.

²⁰ *Ibid* 31-33.

confidence and integrity of the process while ensuring any federal NIC could fulfil its mandate.

20. On the issue of publicising findings, the Law Council notes that the CCC recently conducted an inquiry on the question of whether it is in the public interest to publicise allegations of corrupt conduct. Although by default CCC hearings are private, Queensland law does not prevent people from publishing information that a complaint has been made or might be made to the CCC, though the CCC has the power to constrain publication where it might impair performance of its functions. With one exception,²¹ the CCC ultimately concluded that those laws should not change.
21. The CCC noted that from the submissions it received, those in favour of publicising corruption allegations considered that public discussion and debate are important elements of open and accountable government, and publishing allegations of corruption has led to the exposure of corruption. It also noted that those who did not support publication did so because of the potential for it to prejudice the CCC's ability to investigate the allegations of corruption, to damage a person's reputation and damage the public's trust in their institutions of government.²²
22. Insofar as media coverage and publicising findings is concerned, Law Council considers that an appropriate balance should be struck between, on the one hand, the public interest in transparency, and on the other hand, the ability of any federal NIC to discharge its functions, and the often irreparable damage that being unfairly implicated in allegations may have on a person's reputation. Restrictions on publication of federal investigations is therefore important. Many investigatory bodies maintain strict confidentiality about matters under investigation, due to a range of public interest considerations and, while there is a strong public interest in disclosure of corruption, there are strong arguments against disclosure of information about investigations before evidence of actual corruption is uncovered.

Response to matters noted by the Committee in its Interim Report May 2016

23. In its Interim Report, the Committee sets out concerns raised regarding the adequacy of the current system for addressing corruption, as well as the arguments both in favour and against the establishment of a federal NIC as set out in the submissions it had received to date. While the Law Council affirms its previous position that the Australian Government should consider on the basis of a National Integrity System assessment whether it should establish a broad-based federal NIC, there are some matters arising from those arguments which warrant further comment.

²¹ The exception was regarding publicising allegations of corruption against a councillor or candidate in the lead-up to local government elections. The CCC's data indicated that a large number of the allegations it received in this area were baseless and, it considered, designed to effect electoral damage on political opponents. It recommended the government consider making it an offence for any person to publicise allegations of corrupt conduct against a councillor or candidate during a local government election period without first notifying the CCC and allowing the CCC to investigate to determine whether the allegations have merit: Crime and Corruption Commission Queensland, *Publicising allegations of corrupt conduct: Is it in the public interest?* (December 2016) viii [9] <<http://www.ccc.qld.gov.au/research-and-publications/research-and-publications-1>>.

²² Ibid viii [6].

“Existing strong anti-corruption framework underpinned by a democratic system”

24. The Interim Report notes that the Australian Government does not support the creation of a federal NIC because it considers that Australia already has an existing strong anti-corruption framework, and this is underpinned by a democratic system of representative government and the separation of powers enshrined in the Australian Constitution.²³
25. The Interim Report also details the various measures claimed to form part of the existing strong anti-corruption framework, including Australia’s commitment to international instruments relevant to anti-corruption.²⁴ The Law Council notes that ratifying these instruments is an important and necessary step in Australia’s commitment to anti-corruption. However, what is also required is the development and implementation of measures that give effect to Australia’s undertakings with respect to these instruments.
26. To the extent that Australia’s existing anti-corruption framework is underpinned by a democratic system of government, the Law Council notes that it is well-established that corruption has the potential to undermine democratic institutions. Therefore it cannot be assumed that democratic institutions alone will insulate Australia from the impact of corruption in the absence of a national strategy for addressing corruption.²⁵
27. According to Transparency International, while countries that rank highly on its Corruption Perception Index, like Australia, tend to have stronger democratic institutions, like higher degrees of press freedom, access to information about public expenditure, stronger standards of integrity for public officials and independent judicial systems, they cannot afford to be complacent.²⁶ Countries with strong democratic institutions can still be impacted by conflicts of interest, illicit finance and patchy law enforcement.²⁷ Transparency International has noted that Australia remains outside the top 10 countries on the Transparency International index for the third consecutive year, with Australia’s performance marred by recent foreign bribery scandals and threats to independent institutions.²⁸
28. The Interim Report highlights concerns that despite best efforts, existing law enforcement efforts for combating corruption at the federal level may be under-resourced and lack coordination.²⁹ To that end, the Law Council also notes that while the Fraud and Anti-Corruption Centre within the Australian Federal Police is able engage in cross-agency coordination to investigate complex corruption cases, it is not an independent body, as its constituent members are drawn exclusively from government departments.

²³ Senate Select Committee on the Establishment of a National Integrity Commission, *Interim Report* (May 2016) 15 [3.17] (citing the Department of the Attorney-General).

²⁴ *Ibid* [3.18] – [3.19].

²⁵ See the Law Council’s previous recommendation that a national strategy for addressing corruption be developed: Law Council of Australia, *Submission on the Establishment of a National Integrity Commission* (20 April 2016) 3, 11.

²⁶ Transparency International, *Corruption Perceptions Index 2016* (25 January 2017) <http://www.transparency.org/news/feature/corruption_perceptions_index_2016>.

²⁷ *Ibid*.

²⁸ Transparency International, *Asia Pacific: Fighting Corruption is Side-lined* (25 January 2017) <http://www.transparency.org/news/feature/asia_pacific_fighting_corruption_is_side_lined>.

²⁹ See Senate Select Committee on the Establishment of a National Integrity Commission, *Interim Report* (May 2016) 24 – 25.

29. The independence of agencies tasked with investigating corruption is essential to guard against any undue government influence or interference that might affect the integrity of any investigation. Any federal corruption investigation would necessarily implicate members of federal government, parliament or departments, therefore independence from the parties the agency may be tasked with investigating is essential to promote public confidence in its outcomes.

Addressing the difficulties in balancing independence with the accountability of anti-corruption agencies

30. The Interim Report notes that:

While most submissions and witnesses seemed to agree that a measure of independence was required for integrity commissions to complete their work, it was pointed out to the committee that balancing independence and accountability has proved notoriously difficult. The IPA noted that following the establishment of anticorruption agencies, governments have been disinclined to undertake necessary modifications for fear of being accused of attempting a cover-up.³⁰

31. Since the publication of the Interim Report, some of the difficulties in balancing independence and accountability of ACAs have transpired at the state level.

32. For example, in October 2016, the ICAC Committee recommended that ICAC be moved from a one commissioner model to a three commissioner model.³¹ This recommendation followed its inquiry into ICAC's aborted investigation of Crown Prosecutor Margaret Cunneen, an investigation ICAC was forced to abandon after the High Court of Australia found that it was outside the scope of its mandate.³² Further, it followed the unsuccessful prosecution of former State Emergency Service Commissioner Murray Kear, who had criminal charges against him dismissed by a Magistrate in the NSW Local Court who criticised the investigation as being conducted in a way that was unreasonable and improper.³³

33. During its hearings, senior members of the legal profession told the ICAC Committee that, "if you bring a greater breadth of experience and a greater number of minds to the [ICAC] it is highly likely that [its] functioning will be improved," and "[ICAC] must make many important and difficult decisions and a panel might increase public confidence in the quality of decision making while also reducing the considerable pressure which is placed on a single commissioner under the present structure".³⁴ The ICAC Committee agreed with these views and therefore recommended the three commissioner model as a method to improve the functioning of the ICAC after a year in which its investigations had been called into question.

³⁰ Ibid 29 – 30 [3.18].

³¹ Committee on the Independent Commission Against Corruption, Parliament of New South Wales, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports* (October 2016) 1 - 5.

³² *Independent Commission Against Corruption v Margaret Cunneen & Ors* [2015] HCA 14; (2015) 256 CLR 1.

³³ See Chris Merritt, "Court says ICAC's Murray Kear case improper" *The Australian* 27 May 2016 <<http://www.theaustralian.com.au/news/nation/court-says-icacs-murray-kear-case-improper/news-story/0fcf645fea245b85089276174bf15d60>>.

³⁴ Committee on the Independent Commission Against Corruption, Parliament of New South Wales, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports* (October 2016) 1 [1.1] – 2 [1.2].

34. However, the NSW government was widely criticised when it adopted this recommendation. Some saw the adoption of the recommendation as aimed at diluting the power of the Commissioner and therefore the ICAC, while others considered it a retributive move against the then-Commissioner.³⁵

Recommendation:

- **Consideration should be given to how any federal NIC is constituted from the outset, and as well to designing a transparent mechanism for making any necessary adjustments to its functioning following its inception.**

³⁵ See Sean Nicholls, "Three commissioners better than one: inquiry calls for ICAC overhaul" *The Age* (27 October 2016) <<http://www.theage.com.au/nsw/three-commissioners-better-than-one-inquiry-calls-for-icac-overhaul-20161027-gsbw86.html>> and Sean Nicholls and Michaela Whitbourn, "Labor baulks at ICAC reform without Megan Latham as commissioner" *The Sydney Morning Herald* (15 November 2016) <<http://www.smh.com.au/nsw/labor-baulks-at-icac-reform-without-megan-latham-as-commissioner-20161115-gspg4l.html>>.