

## Additional Comments from NXT

1.1 At the outset the NXT would like to acknowledge the work of this committee. The majority report explores many of the issues relating to integrity commissions around the country, including their successes and their drawbacks. We are encouraged that both the major parties have taken the issue of establishing a national integrity commission so seriously, however we believe that given the weight of the evidence received by the committee this inquiry has missed an important opportunity to recommend the establishment of a national integrity commission. The NXT strongly believes that a national integrity commission should be established.

### Recommendation 1

**1.2 The NXT recommends that the Commonwealth government establish a national integrity commission with broad scope to address integrity and corruption matters. The Commonwealth should strongly consider extending the powers of an existing agency to perform this function.**

1.3 The Commonwealth would benefit from a single umbrella commission that can direct complaints regarding corruption and integrity. There is currently no single point for making a complaint regarding corruption, and evidence indicates this creates public confusion as to where to report concerns. As outlined by Mr Samuel Ankamah of Griffith University:

once [people] know that there is an umbrella body and that they are always able to go to such an umbrella body to report corruption then because this body would have the power to require any other body to investigate that issue and also have the power to require that body to report back to the commission, that would actually boost [public] confidence.<sup>1</sup>

1.4 A federal national integrity commission would be of benefit as a useful first point of contact for people wishing to report corruption.

1.5 The establishment of a national integrity commission also has the ability to provide the public with clarity and certainty regarding what can, and is investigated, without having to report to numerous agencies. During committee hearings, Senator Kakoschke-Moore questioned Professor Gabrielle Appleby on importance of having a single agency to which corruption can be reported, ensuring that the ability of individual agencies to undertake their functions is supported.

**Senator KAKOSCHKE-MOORE:** One of the things that I have noticed throughout the evidence in the submissions that we have received is that there does seem to be a level of public confusion about what exactly corruption is and then, once you have identified behavioural conduct that you think does not stack up, there is uncertainty about where you should go to report that.

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1 Mr Ankamah, Griffith University, *Committee Hansard*, 15 May 2017, p. 5.

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I would be interested to know your views on whether that is because the complaints received were not about corrupt conduct per se or whether they were just directed to the wrong body. The ombudsman had similar statistics that demonstrated that most of the reports made were not within the purview of the Ombudsman.

**Prof. Appleby:** I think this goes to a few points that have already been discussed by Professor Twomey and Professor McMillan earlier on the issue about public understanding and public education—where you might go to lodge a particular complaint about a particular agency, and at what level. At the Commonwealth level, the diffusion of agencies is such that there is confusion. There is no one-stop point to make a complaint, and people do need to have some understanding. I think that that actually undermines the ability of individual agencies to fulfil their functions. It may actually dissuade people from coming forward because they are confused. 'Should I go to the ombudsman? Should I go to ACLEI?' That sort of thing.

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I think I am much more persuaded by Professor McMillan's suggestion this morning that maybe there should be a one-stop button that you press for a complaint and then there is a triage system that sits behind that. I do not think it is fair for the public to have to understand the nuances of what might be the jurisdictional bar for one particular agency over another. If they have concerns and they want to be able to have them addressed by the most appropriate agency, the Commonwealth should create a funnel for those complaints.<sup>2</sup>

1.6 The NXT supports the committee's view that consideration could be made to extend the existing powers and jurisdiction of the Australian Commission for Law Enforcement Integrity rather than establishing a new agency, as long as it is appropriately resourced. The NXT is wary of implementing an entirely new body within the existing integrity framework that may replicate the scope of other agencies and add to increasing public confusion regarding the current federal framework.

## **Recommendation 2**

**1.7 The NXT recommends that the Australian National Audit Office (ANAO) undertake an audit of the national integrity framework prior to implementing a national integrity commission, with the aim of identifying vulnerabilities and gaps within the existing framework.**

1.8 The ANAO has the broadest jurisdiction of the federal institutions through its performance audit powers, and possesses the greatest transparency within its reporting capabilities. The Commonwealth should utilise these powers and require the ANAO to undertake a cross-sectoral and inter-institutional investigation into the existing national integrity framework. This investigation should be completed prior to the

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2 Professor Appleby, *Committee Hansard*, 12 May 2017, p. 14.

implementation of a new national integrity agency in order to assess the effectiveness and scope of existing integrity mechanisms.

1.9 A ‘systemic audit of existing institutions’ is also recommended by Professor Gabrielle Appleby as a method to determine whether there are institutional gaps in existing organisations.<sup>3</sup> Similarly, Ms Gabrielle Bashir SC, member of the Law Council of Australia, argued that a ‘national integrity system assessment’ is required to determine whether and where gaps within the existing framework are located.<sup>4</sup> The NXT agree with the suggestion in Griffith University’s submission that a new national integrity commission will not provide a solution to gaps in the current framework, unless this new commission is ‘well designed to achieve the intended purpose’.<sup>5</sup> An audit of the existing framework would provide a new agency with the ability to ensure the Commonwealth has a strong anti-corruption framework.

### Recommendation 3

#### **1.10 The NXT recommends that the new national integrity commission be empowered to hold public hearings.**

1.11 NXT believes in transparency and accountability in the investigation process. The Australian public have lost confidence in the processes undertaken by integrity agencies, in part due to the closed-door approach to many investigations. Greater transparency in the investigation of corruption is required at a federal level. This can be achieved in part by undertaking public hearings for corruption matters, which provides people with an insight into how issues of corruption can be managed and resolved.

1.12 The NXT support the model followed by the NSW ICAC which requires that any public hearing must be approved by a panel of three commissioners who determine whether the process would be in the public interest. This restructure was recommended by the Committee on the Independent Commission Against Corruption in its October 2016 report: *Review of the Independent Commission Against Corruption: Consideration of the Inspector’s Reports*.<sup>6</sup> Investigative journalists Ms Kate McClymont and Mr Michael West who have reported extensively on state corruption matters, agreed with the new requirement that a public hearing by NSW ICAC must be approved by a panel of commissioners.<sup>7</sup> Requiring a panel of

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3 Professor Appleby, *Committee Hansard*, 12 May 2017, p. 12.

4 Ms Bashir SC, Law Council of Australia, *Committee Hansard*, 16 June 2017, p. 6.

5 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia’s National Integrity System: Priorities for Reform*, March 2017, p. 4.

6 Committee on the Independent Commission Against Corruption, *Review of the Independent Commission Against Corruption: Consideration of the Inspector’s Reports*, October 2016, p. viii.

7 Ms McClymont, Fairfax Media and Mr West, Journalist and Proprietor, michaelwest.com.au, *Committee Hansard*, 12 May 2017, p. 29.

commissioners to consider each matter separately would ensure that every matter is subject to additional scrutiny and discussion, which the NXT believes is in the public interest.

1.13 The Australia Institute advocates for public hearings and argued that the 'regular conduct of public hearings' in NSW 'greatly contributed to its success in investigating and exposing corruption'.<sup>8</sup> In their submission to the inquiry the Australia Institute also quoted former officers of the NSW ICAC, including former assistant NSW ICAC Commissioner Anthony Whealy QC, who has stated that 'there are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost', and former NSW ICAC Commissioner David Ipp QC who said of the ICAC that '[i]ts main function is exposing corruption; this cannot be done without public hearings'.<sup>9</sup>

1.14 Public hearings allow members of the public to access important information about the issues, and encourage people with relevant further information to approach the agency and provide evidence. The use of public hearings is supported by Transparency International, who noted the importance of potential witnesses coming forward and providing useful information after the dissemination of initial information through the public hearing process.<sup>10</sup> The Chief Executive Officer of the Qld CCC, Mr Smith, has stated that in appropriate situations public hearings are very important, but notes that they should be carefully used in the right circumstances.<sup>11</sup> The NXT believe public hearings encourage greater information gathering processes which lead to better investigations and better outcomes.

1.15 The SA ICAC is required to hold all of its examinations relating to corruption in public administration in private. Previously, SA ICAC's Commissioner Bruce Lander has argued that no examinations should be held in private especially in the case of misconduct and maladministration matters.<sup>12</sup> The Australia Institute claims that the SA ICAC's inability to hold public hearings makes it the least effective of all of the state ICAC bodies, relying on data such as referral numbers to determine

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8 The Australia Institute, *Submission 14*, p. 9.

9 The Australia Institute, *Submission 14*, p. 9 (citations omitted).

10 Transparency International Australia, *Submission 21*, pp 7-8.

11 Mr Smith, Qld CCC, *Committee Hansard*, 15 May 2017, p. 13.

12 Leah MacLennan, 'South Australia's ICAC Commissioner says fractured relationship with Police Ombudsman is "improving"', *ABC News*, 10 November 2015, available: <http://www.abc.net.au/news/2015-11-10/icac-commissioner-bruce-lander-faces-public-integrity-committee/6927066> (accessed 16 August 2017); see also discussion at Gilbert + Tobin, *Submission 18*, Attachment 1, p. 26.

‘success’.<sup>13</sup> Any national integrity agency should have the power to hold public hearings. The NXT believe that the SA ICAC’s inability to hold public hearings is a gross failure of the design of that commission.

1.16 Public hearings also have the benefit of maintaining public confidence in an integrity and corruption commission process. Professor Anne Twomey expressed her preference for public over private hearings. She argued that ‘if you do all of those sorts of things behind closed doors, then there will be a perception that the system is protecting its own. I think that we have got to be careful about that’.<sup>14</sup> During committee hearings Senator Kakoschke-Moore put questions to Mr Ankamah from Griffith University regarding the connection between a public perception of corruption and public hearings:

**Senator KAKOSCHKE-MOORE:** I would like to go to the issue of a potential federal anti-corruption, pro-integrity commissioner's relationship with the public, because certainly from what I have read and the evidence we have heard it seems that the absence of a federal anti-corruption body is perhaps contributing to the perception that there is corruption at a Commonwealth level. Mr Ankamah, I wonder if you could tell the committee a little more about your thoughts about how that relationship should be developed. In particular, I would be interested to know your thoughts on the public hearings.

**Mr Ankamah:** Thanks very much, Senator. I think that is a very good question. Public hearings are very significant for such a body. In addition to the agency being able to hold private hearings, in my view, and in my own research, which I am conducting right now, there are three main things about public hearings. One of the things they do is that they are able to flush out more evidence for the agency's own investigations, and they are also able to build support and make confidence in such an agency. One thing I know is that when there is so much secrecy in investigations or operations, the public tends to see it as too secretive and not to believe in what the agency is doing. That is where the perception comes from that they are being controlled by some power somewhere. Once there are public hearings then people are able to participate and to know what is going on. Even those who are not able to participate are able to read excerpts in newspapers, and so it garners public support when the reports of such investigations come out. It is also very important, as sometimes it leads to identification of more systemic corruption. Sometimes, as was in one of the submissions, the issue is the tip of the iceberg and it might lead into the lower part of the iceberg. So public hearings are also very significant in that aspect.<sup>15</sup>

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13 Miles Kemp, ‘Report finds SA ICAC least effective in Australia because hearings are kept secret’, *The Advertiser*, July 31 2017, available: <http://www.adelaidenow.com.au/news/south-australia/report-finds-sa-icac-least-effective-in-australia-because-hearings-are-kept-secret/news-story/dc31ca2a1ef1eb334dbec39774de6d4c> (accessed 11 September 2017).

14 Professor Twomey, *Committee Hansard*, 12 May 2017, p. 21.

15 Mr Ankamah, *Committee Hansard*, 15 May 2017, p. 4.

The NXT believes that public hearings are vital in the anti-corruption process as they ensure public confidence in government bodies remains high.

1.17 The NXT acknowledges that without appropriate safeguards, public hearings may have serious consequences for a person's reputation, especially where a person is required to answer questions in public in relation to an inquiry. This potential is amplified when procedures of commissions mirror court proceedings, or are conducted in conjunction with police investigations. Mr Michael Griffin, the Integrity Commissioner of the ACLEI noted that in considering whether to hold a public hearing he first considers whether there are police investigations afoot as, '[i]f I were to conduct a public hearing, I might prejudice those police investigations or there may be court proceedings and I would run the risk of prejudicing a fair trial to a person'.<sup>16</sup> The NXT believes that the decision to hold a public hearing should only occur if the majority of commissioners determine it is overwhelmingly in the public interest to do so. Similarly, the procedures adopted by a national integrity commission should not mirror too closely practices used by the courts. This will assist in reducing the public perception that being questioned by the integrity commission is akin to being prosecuted for an offence.

#### **Recommendation 4**

**1.18 The NXT recommends that the new national integrity commission be empowered to investigate non-government organisations and agencies who receive public funds.**

1.19 There is currently no purview in South Australia for the state ICAC to investigate people or organisations who are recipients of public funds, and who are not public officers or authorities. The inability of the SA ICAC to initiate these investigations is another failure. SA ICAC Commissioner Lander supports the investigation of organisations that are provided with public funds 'if in fact they or their officers engage in corruption'.<sup>17</sup> Any new federal integrity agency should have the power to follow the path of public funds and investigate where matters of corruption arise.

1.20 A number of witnesses and submissions to this inquiry support the extension of integrity agencies powers to include the ability to investigate non-government organisations and agencies who receive public funds. The Gilbert and Tobin Centre of Public Law recommended that a federal integrity agency have the power to investigate agencies as well as government contractors.<sup>18</sup> Professor Brown of Griffith University suggested that a new federal integrity agency be empowered 'to follow the dollar and follow the powers'.<sup>19</sup> This would ensure that where any Commonwealth money or

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16 Mr Griffin, ACLEI, *Committee Hansard*, 5 July 2017, p. 44.

17 Mr Lander, SA ICAC, *Committee Hansard*, 15 May 2017, p.30

18 Gilbert + Tobin, *Submission 18*, p. 3.

19 Professor Brown, Griffith University, *Committee Hansard*, 15 May 2017, p. 10.

services are ‘being exercised or delivered on behalf of the Commonwealth as a result of grants programs or whatever, there should be the ability for the commission to follow those dollars and follow those powers’.<sup>20</sup> The Independent Broad-based Anti-corruption Commission Committee also noted that giving the commission the power to access documentation of individuals and organisations in receipt of government funding would enhance their ability to investigate corruption.<sup>21</sup> Public funds should be put to public use and any misuse of public funds should not be tolerated. The NXT believes that there is currently not enough oversight of non-government organisations and agencies who receive public funds and that this should be addressed by a new national integrity commission.

## Recommendation 5

### 1.21 The NXT recommends that the new national integrity commission should be empowered to initiate own investigations into systemic matters of integrity and corruption.

1.22 A new federal national integrity commission should be able to initiate investigations into all relevant concerns regarding systemic corruption. This would ensure that an investigation can be launched without a specific complaint being made. Professor Appleby stated that ‘any national integrity commission should be investigating serious or systemic corruption’, with serious corruption being defined as ‘corrupt conduct that would reduce public confidence in government and systemic corruption as corruption that demonstrates a pattern of behaviour’.<sup>22</sup> Investigative journalist Mr Nick McKenzie of Fairfax media noted that the ‘need for an ICAC type body arises when you have systemic corruption involving a number of public officials perhaps’.<sup>23</sup>

1.23 The SA ICAC Commissioner has the power to initiate own inquiries and the committee heard from Commissioner Lander who noted that:

[t]here are some matters that, on reflection, I think I should have investigated but did not. I think there are a couple of matters where it would have been better if I had acted on my own initiative where we did not receive complaints and investigated two particular matters, and I regret doing that, but the time has passed to make it not relevant any longer.

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They were a couple of matters I read about in the media, and I thought at the time, 'Well, this doesn't seem appropriate,' but did not act on my own

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20 Professor Brown, Griffith University, *Committee Hansard*, 15 May 2017, p. 10.

21 Independent Broad-based Anti-corruption Commission Committee, *The performance of the Independent Broad-based Anti-corruption Commission and the Victorian Inspectorate 2015/16, November 2016*, pp 23–24.

22 Professor Appleby, *Committee Hansard*, Friday 12 May 2017 p. 13.

23 Mr Nicholas McKenzie, Journalist, Fairfax Media, *Committee Hansard*, 12 May 2017, p. 36.

initiative. I should have, I think. They were not reported to me later, but I think, with the benefit of hindsight, it would have been better if I had initiated my own investigation into those matters. I think I probably did not because nobody complained about them, but that really is not a satisfactory explanation. As I say, I think I should have done that.<sup>24</sup>

1.24 The example above indicates that the power to hold own motion inquiries is essential, however it is equally essential that commissioners use this power whenever it is required. The NXT supports the new national integrity commission having own motion powers in order to investigate matters of systemic corruption.

**Senator Skye Kakoschke-Moore**  
**Deputy Chair**

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24 The Hon. Bruce Thomas Lander QC, Independent Commissioner Against Corruption, SA ICAC, *Committee Hansard*, 15 May 2017, p. 36.