

***Response to Question on Notice:
Senate Select Committee on Administration of Sport Grants, Melbourne hearing,
on 12 March 2020.***

12 April 2020

Dear Senator Anthony Chisholm, Committee Chair

COMPARISON OF INTEGRITY COMMISSION MODELS

Thank you for the opportunity to present to the Senate Select Committee on Administration of Sports Grants at the Melbourne hearing of 12 March 2020. Please find below our response to the following Question on Notice taken at the hearing:

***Senator RICE:** You said you looked at some models. There are two models currently under consideration: the government's model, which we still haven't seen legislation for, and the National Integrity Commission Bill 2018 (No. 2), which is a Greens bill that passed the Senate and is now before the House of Representatives. Can I ask you on notice to look at those two models and give some commentary on them?*

To summarise our response, we believe there is a sensible middle ground between the principal models that have been put forward. Such a model would have the powers of a standing Royal Commission, with discretion to hold open, Royal Commission-style hearings, subject to a public interest test; would apply legal principles consistent with our courts; would be structurally subservient to the national parliament; would have wide and well-resourced investigative functions; and would be designed explicitly to complement our other principal accountability and oversight bodies and our overall public integrity architecture.

In both models there are missed opportunities and unresolved design questions. These relate in particular to innovation in integrity frameworks and investigative tools; research into integrity best practice; advocacy and promulgation of integrity principles and practices, including greater openness and innovation in the fight against fraud and corruption; establishing greater consistency in integrity frameworks and expectations; relationships with state-based integrity bodies; and the role of the media in the overall integrity system. These opportunities and questions are explored further in the body of this response.

Mr Scott Hamilton and I would be happy to provide more detailed information on any aspects of this response, and to contribute further to the Committee's deliberations as needed.

Yours sincerely,

Professor Stuart Kells

Response to Question on Notice: Models for integrity commissions

Introduction

The concept of an integrity or anti-corruption commission has gained wide currency in the academic literature and in jurisdictions around the world. Countries in the Asia-Pacific region that have an integrity commission include China, Indonesia, Malaysia, South Korea and Thailand. (The Hong Kong Independent Commission Against Corruption was established in 1974 with a scope that, importantly, spans both public and private sector corruption, ‘reflecting the status of the island as a global financial centre in the region’.¹)

Integrity commissions perform integrity functions over and above those of public audit offices (which typically focus on agency efficiency, effectiveness and financial accountability) and ombudsmen (administrative accountability and complaints handling).

In Australia, there is currently no standing integrity or anti-corruption commission at the national level. The Commonwealth Government is the ‘odd jurisdiction out’ on the southern continent: every Australian state and mainland territory has an integrity or anti-corruption commission (*see table below for examples*).

Independent Commission Against Corruption (ICAC)	Established in 1988 as an independent body to protect the public interest, prevent breaches of public trust, and guide the conduct of officials in the New South Wales public sector.
Crime and Corruption Commission (CCC)	Independent statutory body set up in 2002 to combat and reduce the incidence of major crime and corruption in the public sector in Queensland . Investigates crime and corruption, has oversight of the public sector including police, and protects witnesses.
Independent Broad-based Anti-corruption Commission (IBAC)	Victoria's agency formed in 2012; prevents and exposes public sector corruption and police misconduct. Jurisdiction covers state and local government, police, parliament and the judiciary.
Independent Commissioner Against Corruption (ICAC)	South Australia , formed in 2013.
Crime and Corruption Commission (CCC)	Western Australia , formed in 2004.
Independent Commission Against Corruption (ICAC)	Northern Territory , formed in 2018.
ACT Integrity Commission	Australia Capital Territory , commenced in 2019.

¹Dela Rama, M. & Lester, M. (2019) Comments on Commonwealth Integrity Commission – Proposed Reforms, 1 February 2019, *Attorney-General's Department*, Submission 26: <https://www.ag.gov.au/Consultations/Documents/commonwealth-integrity-commission/Dr-marie-dela-rama-mr-michael-lester.pdf>.

International institutional context

In framing a government to be administered by men over men*, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. —James Madison, 1788 [*sic].*

The World Bank's 2002 World Development Report focused on building institutions that would promote global growth and reduce poverty. This included putting in place government institutions that combatted government corruption and promoted freedom and transparency.

There is a tension in the development of the modern state between ensuring that public officials have sufficient power to deliver good governance and ensuring that they are constrained from using this power arbitrarily in the interests of the privileged few. When they are not constrained, their ability to provide the institutions that support markets—by increasing access to information, enhancing competition, and enforcing contracts—is impaired. This is particularly important in the case of the protection of property rights, where the formal establishment of such rights has little effect in the absence of a credible commitment by the state to respect and enforce them.²

The 2002 Report distilled four lessons with regard to building effective institutions:

1. Design them to **complement** what exists—in terms of other supporting institutions, human capabilities, and available technologies. The availability and costs of supporting institutions and capacity determine the impact of any particular institution. By understanding how institutions interact, we can identify priorities.
2. **Innovate** to identify institutions that work—and those that do not. Sometimes this requires experimentation. Even in countries with similar incomes and capacities, innovation can create stronger institutions because of differences in local conditions, differences that range from social norms to geography. Countries can gain from expanding successful public innovations and adopting private innovations. But they must also have the courage to drop failing experiments.
3. **Connect** communities of market players through open information flows and open trade. Exchanging information changes behaviour. It creates demand for institutional change by holding people to account and by supplying ideas for change from outside the community. Linking communities of people in networks of information and trade is thus a priority for those building market-supporting institutions.
4. Promote **competition** among jurisdictions, firms, and individuals. Developing country market actors often face too little competition, and changing this will significantly improve institutional quality. Greater competition modifies the effectiveness of existing institutions, creates demand for new ones, and increases choice for consumers. Competition among jurisdictions highlights successful institutions and promotes demand for them. Competition among firms and individuals does the same.

² The World Bank (2002), World Development Report 2002: Building Institutions For Markets., Oxford University Press. Chapter 5 pg 99 <https://openknowledge.worldbank.org/bitstream/handle/10986/5984/WDR%202002%20-%20English.pdf?sequence=1&isAllowed=y>.

Australian integrity context

On the whole, Australian governments deliver well for the Australian people. While tipping over ‘tall poppies’ is an unfortunate part of the Australian psyche, Australia stands tall in the integrity landscape. When compared to many other countries around the world, this country has a commendably stable, meritocratic and well-functioning system of government.

Nevertheless, surveys show a consistent loss of faith in politics and public institutions, including as a result of integrity scandals. (Any collage of scandals must include Queensland and WA in the 1980s; and agencies such as the Australian Wheat Board and Note Printing Australia.) We have never before seen such a level of distrust in our institutions in Australia.

Recent royal commissions into banking and aged care revealed that some scepticism from the Australian people is at least partly valid. Waste and delays in major projects and programs such as the NBN and NDIS, and the lack of progress on wicked problems of climate change and closing the gap, are also feeding the loss of trust. (Other prominent examples of governments failing to meet community expectations include the infamous ‘pink bats’ affair during the GFC, and the Ruby Princess fiasco, which took place at the height of the worst pandemic of recent history.)

In general, the state-based integrity commissions have assembled a strong track-record. They have shone lights in many dark places, including property development, public procurement and political donations. Offenders have been prosecuted, councils have been sacked, and members of parliament have fallen on their swords.

In the political donations sphere, there have been concerns about foreign government interference, and about donations from overseas bodies such as the NRA. We have also seen unprecedented use of money in Australian politics, with one individual out-spending major political parties in the recent federal election. ‘The Palmer advertisements were a problem in more ways than one. They contained content that was possibly distorted, potentially divisive, and likely damaging to Australia’s reputation and international relationships.’³ The recent ‘sports rorts’ affair highlighted a step-change in the political use of program funds. These new threats require new laws and institutions empowered to ‘follow the money’ and to ‘follow the data’, to ensure integrity in government.

A less visible problem, but one that is just as important, is the increasingly clever and tricky use by governments of Freedom of Information rules – to avoid scrutiny and accountability.

29 November 2019: Threats to press freedom: Kerry O’Brien rallies journalists at the Walkley Awards, saying press ‘freedom is usually eroded gradually’. ‘For a brief moment in the history of Australian journalism,’ O’Brien says, ‘every significant news organisation in this country, put its competitive instincts and its differences to one side, and united in one voice, to stand against the unacceptable step down the road to authoritarianism that we witnessed recently.’⁴

³ Hamilton, S. & Kells, S. (2019) It’s time - for the Palmer electoral law, Inside Story, 23 May 2019: <https://insidestory.org.au/its-time-for-the-palmer-electoral-law/>.

⁴ <https://www.walkleys.com/kerry-obrien-speech-2019-walkleys/>.

Openness and transparency are essential to democratic government. The more a populace trusts its government, the more it will act in pro-social ways. This is critical when it comes to confronting wars and pandemics and other large-scale challenges, as well as everyday ones.

Notwithstanding the overall integrity of Australian institutions in relative terms, surveys consistently show high perceptions of corruption. For example, an Australian survey conducted by Griffith University and Transparency International measured community perceptions of corruption at the federal level. It found 85 per cent of respondents believed at least some members of the federal parliament were corrupt, and 18 per cent of respondents considered that most or all members were corrupt. Over recent years, Transparency International's global index of political and public corruption has ranked Australia's government 13th in the global rankings out of 180 countries.

There is high community support for a national integrity commission. There is also bipartisan support for such a body, though the major parties differ on how it should be governed and empowered, and how it should function.

Design dimensions and issues

The following table summarises some of the key dimensions of the design of integrity and anti-corruption bodies.

Topic/feature	Description/comments
<i>Powers</i>	for example: in relation to information gathering, compelling witnesses, referral powers; 'follow the money' powers: scope to look at private sector, pierce the corporate veil. Also the power and capability to 'follow the data'
<i>Relationship to parliament</i>	for appointments, reporting, resources, oversight
<i>Relationship to the courts</i>	legal powers, referral powers, application of legal principles and standards
<i>Relationship to the community</i>	public hearings, reporting, disclosure; engagement with community organisations and the media; scope to receive complaints
<i>Resources</i>	the extent to which the body has sufficient, reliable and apolitical funding to fulfil its mandate, including with sufficient tools and scope for innovation
<i>Governance and administration</i>	including appointment of senior officers, staffing
<i>Scope</i>	the range of matters the body can look at; the time period, e.g. ability to look to the past; other scope issues, e.g. ministerial advisers, boards of public entities, overseas organisations and transactions
<i>Jurisdiction</i>	federal, state, local government; public and private sectors; Australian and foreign; military and security matters; police matters

Topic/feature	Description/comments
<i>Relationship with other laws and standards</i>	press freedom, foreign interference laws, audit and accountability legislation, probity standards
<i>Relationship with other oversight and integrity bodies</i>	state and national audit offices, public service commissions, other Commonwealth Government regulators and commissions, ombudsmen
<i>Relationship with other parts of the overall integrity system</i>	including state-based integrity bodies; and complementing and protecting the rights of journalists and a free media; links to investigative journalism, freedom of information

Design issues and risks

The design of integrity bodies seeks to avoid problems such as:

- unfair treatment of witnesses and other participants
- inconsistent standards of evidence
- misuse of information
- misconduct by the leaders of the body
- undermining the pre-eminence of parliament and the courts
- complicating overall governance
- weakening major institutions
- reaching conclusions and making decisions that are subsequently overturned
- establishing a tyrant.

The High Court reprimanded the ICAC in New South Wales for abuse of power and damaging reputations without sufficient evidence. Such criticisms of integrity bodies have been repeated elsewhere, including in the national parliament.

Senator Dean Smith: Let's not forget that many of the people that lead these ICAC bodies are very notable and very 'experienced'. But that does not mean that independent anticorruption bodies are free from overstepping their mark and undermining such a cherished and important principle as that of parliamentary privilege, which goes to the core of our successful parliamentary democracy.⁵

Senator Stoker: A significant number of people in our community recognise the shortcomings of existing state based integrity bodies in relation to public hearings. Most significantly, New South Wales ICAC removes the right to silence and the privilege against self-incrimination. Witnesses there are forced to testify against their will under the threat of criminal sanction, and the risk of irreparable reputational damage, irrespective of whether or not there is a finding of wrongdoing, is alarmingly high. A political opponent or the media can, and do, use a witness's mere testimony before a public corruption hearing as a tool to discredit them, even if the evidence against that person was that they had done nothing wrong or, indeed, they had done things that would never ever reach the standards required to convict them in a criminal court.⁶

⁵ https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/8f5f59a1-32bd-48b2-be73-b477b00ae225/&sid=0019.

⁶ https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/8f5f59a1-32bd-48b2-be73-b477b00ae225/&sid=0016.

Relationship with other oversight and integrity bodies and institutions

There are at least twelve agencies at the Commonwealth Government level that are responsible for ensuring public integrity. In addition to that, there are the courts, the police, parliament, parliamentary committees. In designing and establishing an integrity body, it is essential to consider how that body would interact with other parts of the integrity system.

The parliament and the government would need to simultaneously revisit the functions and powers of other public integrity bodies, and ensure all legislation and guidance for public integrity is up to date and fit for purpose, given the roles and functions of the new body.

The intention here is to maintain administrative efficiency, but also to avoid unhelpful competition between oversight bodies, including a ‘rush to the bottom’ or a ‘gotcha’ mentality in the use of integrity agency powers.

Relevant integrity and governance principles

Key principles of public administration and public entity governance that are relevant to establishing integrity bodies include:

- Accountability, for use of public resources, and the exercise of powers
- Integrity, and the application of high standards of governance
- Efficiency and effectiveness, including the demonstrable creation of public value
- Equity and fairness
- Transparency, including making defensible decisions, and being open to audit and other external scrutiny.⁷

The Australian Government’s proposed integrity commission model

In November 2018, the Federal Government released a discussion paper on a proposed model for a Commonwealth Integrity Commission (CIC) as the lead body in a multi-agency anticorruption framework.⁸ In response, 78 submissions were received and 37 were made public⁹; see this link for further information about the consultation process and submissions: <https://www.ag.gov.au/Consultations/Pages/commonwealth-integrity-commission.aspx>.

The Government-proposed CIC is designed to have a split jurisdiction between:

- a higher risk tier of public sector agencies with access to significant coercive powers (and the skills to use those powers to conceal corrupt offending), as well as access to sensitive information holdings (access to which could aid offending)

⁷ Dela Rama, M., Hamilton, S. & Kells, S. (2020) Submission to the Select Committee on Administration of Sports Grants, 20 February 2020, Australian Senate Committee Secretariat, Submission 8: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Administration_of_Sports_Grants/AdminSportsGrants/Submissions.

⁸ <https://www.ag.gov.au/Consultations/Documents/commonwealth-integrity-commission/cic-consultation-paper.pdf>.

⁹ <https://www.ag.gov.au/Consultations/Pages/commonwealth-integrity-commission.aspx>.

- the remainder of the public sector: public sector agencies and statutory agencies that do not have law enforcement functions; Commonwealth companies and corporations; Commonwealth service providers; and parliamentarians and their staff.⁷

The split structure consists of a ‘law enforcement integrity division’ incorporating the existing structure, jurisdiction and powers of Australian Commission for Law Enforcement Integrity (ACLEI), and a new ‘public sector integrity division’. Both the law enforcement and public sector divisions of the CIC would be headed by separate deputy commissioners, who would each report to a new Commonwealth Integrity Commissioner.

The two divisions are intended to have different jurisdictional coverage, powers and functions, tailored to the nature of the entities within the respective jurisdictions. The law enforcement division would have jurisdiction over those agencies already within ACLEI’s remit:

- the Australian Criminal Intelligence Commission
- the AFP
- the Australian Transaction Reports and Analysis Centre (AUSTRAC)
- the Department of Home Affairs, and
- prescribed aspects of the Department of Agriculture and Water Resources (DAWR).

Its jurisdiction would also be expanded to cover additional public sector agencies with law enforcement functions and access to sensitive information, such as:

- Australian Competition and Consumer Commission (ACCC)
- Australian Prudential Regulation Authority (APRA)
- Australian Securities and Investments Commission (ASIC), and
- Australian Taxation Office (ATO).

The public sector division of the CIC would have jurisdiction over:

- public service departments and agencies, parliamentary departments, statutory agencies, Commonwealth companies and Commonwealth corporations
- Commonwealth service providers and any subcontractors they engage, and
- parliamentarians and their staff.

The CIC proposed by the Government would have broad investigation and enforcement powers. The Government proposes that two new aggravated offences be added to the public sector division of chapter 7 of the Criminal Code; and there is a new ‘failure to report public sector corruption’ offence to be introduced. However,

The Government believes it would not be appropriate to have a ‘one-size-fits-all’ set of significant coercive powers (ACLEI’s powers are akin to those of a Royal Commission’s) for the broad range of public service office-holders and entities engaged to perform public functions.¹⁰

¹⁰ <https://www.ag.gov.au/Consultations/Documents/commonwealth-integrity-commission/cic-consultation-paper.pdf>

The response to the Federal Government's proposal has been mixed. There is clear disquiet in the community and among some integrity practitioners with respect to the proposed model. Put simply, it does not go far enough – with respect to its scope, powers and resourcing – to enjoy widespread support from the academic, legal and general communities.

Senator Waters: The government put out a discussion paper last November. It's been widely criticised as too weak, not having a broad enough scope of powers, not having the ability to conduct hearings in public and not being properly resourced.¹¹

Geoffrey Watson, former counsel assisting the New South Wales ICAC, has described the government's proposal as 'a joke':

Toothless, spineless, and secretive—it would have no power to examine the activities of politicians or those close to them...It also—laughably—prevents the investigation of corruption in the past, with the consequence of protecting crooked politicians from any examination of their misdeeds... The Coalition's proposal is not a real anti-corruption agency; it is a sham. It would be worse than having no commission at all.¹²

In our view, the proposed model is a significant step forward and we should not let the quest for perfection leave us for another decade without an effective integrity commission at the federal level. There is, however, an imperative for such bodies to be designed for the long term, and for them to receive and maintain bipartisan support, to ensure a holistic culture of integrity becomes the Australian norm. We discuss specific design features in a subsequent section of this response.

The Senate's alternative model

On 18 January 2018, then Opposition Leader Bill Shorten outlined Labor's seven design principles for its proposed National Integrity Commission.¹³

1. The Commission will operate as an independent statutory body, with sufficient resources to ensure it is able to carry out its functions regardless of the government of the day.
2. The Commission would be constituted by one Commissioner and two Deputy Commissioners, each of whom would serve for a single, fixed, five-year term.
3. The Commission will have sufficiently broad jurisdiction and freedom of action to operate as a standing Royal Commission into serious and systemic corruption by Commonwealth parliamentarians or their staff, public servants, statutory office holders, the Commonwealth judiciary and the Governor-General.
4. The Commission will be granted the investigative powers of a Royal Commission, including search and surveillance powers, the power to compel witnesses and subpoena documents and carry out its own investigations, with warrant oversight by the Federal Court.

¹¹ https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/8f5f59a1-32bd-48b2-be73-b477b00ae225/&sid=0015.

¹² <https://www.smh.com.au/national/100-000-cash-in-a-shopping-bag-is-eye-catching-but-it-s-not-the-real-issue-20190830-p52mda.html>.

¹³ <https://parinfo.aph.gov.au/parInfo/search/display/display.w3p?query=Id%3A%22media%2Fpressrel%2F5763972%22>.

5. While the presumption will be that hearings will be held in private, the Commission will have discretion to hold hearings in public where it determines it is in the public interest to do so. Labor will continue to consult on the appropriate threshold for such hearings.

6. The Commission will only be empowered to make findings of fact. Any findings that could constitute criminal conduct would be referred to the AFP or Commonwealth Department of Public Prosecutions.

7. A Joint Standing Committee of the Parliament will be established to oversee the Commission and will be empowered to require the Commission to provide information about its work. That Committee will be responsible for appointing the Commissioners. The Commission will also report to Parliament on its performance annually.¹⁴

On 9 September 2019, the Senate CIC legislation passed 35 votes to 32. Labor joined the Greens, Centre Alliance and Jacqui Lambie to defeat the government.

Senator O'Neill: What are we talking about with this word 'integrity'? I commend the Greens political party for at least having the term 'integrity' maintained in this bill. I think there's something very powerful in stating in its title what it is that this bill seeks to achieve: to seek integrity and to preserve integrity. The word 'integrity' actually means all of these things: honesty, uprightness, probity, rectitude, honour, honourableness, good character, ethics, morals, righteousness, morality, nobility, high-mindedness, virtue, decency, fairness, scrupulousness, sincerity, truthfulness and trustworthiness. I cannot think of one Australian I know who wouldn't support the establishment of a body that is aligned to those particular revelations of the best of the human spirit and human endeavour.¹⁵

The stated intent of the Senate CIC model is to create a nationally coordinated integrity framework, with an emphasis on prevention, supported by strong powers of investigation to enable criminal charges or other actions in response to cases of corruption.

Establish the Australian National Integrity Commission (the Commission) as an independent, broad-based public sector anti-corruption commission for the Commonwealth. The objectives of the Commission are to promote integrity and accountability, prevent, investigate and expose corruption, support development and implementation of a national integrity and anti-corruption plan, improve coordination and efficiency in the Commonwealth integrity system, and ensure protection of whistle-blowers.¹⁶

The Commission would have a broad jurisdiction over official corruption, including federal politicians and the federal public sector, and promote responsible business conduct in the private sector. (This public-private scope is important.) The bill creates a National Integrity Commissioner to chair and lead a multi-member and diverse Commission. The National Integrity Commissioner must be a judge or a retired judge. (This, too, is an important feature in maintaining legal consistency and the rights of witnesses and other participants.)

¹⁴ <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id%3A%22media%2Fpressrel%2F5763972%22>

¹⁵ https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/8f5f59a1-32bd-48b2-be73-b477b00ae225/&sid=0018

¹⁶ https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6217_ems_7c3180fe-5f29-4840-8da8-87fbc13f277d/upload_pdf/18241EMMcGowan.pdf;fileType=application%2Fpdf

Senator Waters: Some of the key features of this model are that it could conduct hearings in public. That would be at the discretion of the commissioner. One of the strong principles, and one of the success stories of the various state ICACs around the country, or corruption commissions—call them what you may—has been the deterrent effect. If people know that they might get caught out there is a strong disincentive away from corrupt conduct. So the ability for these hearings to be held in public is a very important strength of this model. The government's model, of course, wants to do it all in secret. That's not going to make a difference to anyone at all. Having public hearings is absolutely crucial. Having the body well-resourced and independent is also crucial.¹⁷

Senator O'Neill: We went to the election with a commitment for a national integrity commission with all the powers of a royal commission. Our plan for a national integrity commission had seven detailed design principles, including that the commission would have a broad jurisdiction to investigate corruption, that it would have the power to initiate its own investigations and that it would have the power to hold public hearings if the commissioner determined it was in the public interest to do so.¹⁸

Key points of difference between the two integrity body models

Powers of a standing Royal Commission and the power to hold public hearings	<p>Under Govt. model, only the Law Enforcement Integrity Division (LEID) component would have the discretion to hold public hearings (as ACLEI currently does).</p> <p>Senator O'Neill: The fourth of Labor's seven design principles is that the commission should be granted the investigative powers of a royal commission, including search and surveillance powers, powers to compel witnesses and subpoena documents, and powers to carry out its own investigations with warrant oversight by the Federal Court. Then, with that information, we suggest the fifth principle would be that, while the presumption will be that hearings will be held in private, the commission would have discretion to hold hearings in public where it determines it is in the public interest to do so.¹⁹</p>
Power to receive referrals and complaints	<p>Under the Senate model, referrals to the Commission can be made by anyone who identifies a corruption issue, including public complaints, and complaints regarding public bodies.</p> <p>Both models place mandatory referral responsibilities on Department Heads, however the Govt. model relies on referrals from other entities.</p>
Scope and jurisdiction	<p>Government model defines the jurisdiction and names the actual bodies. The Senate model is a more broad brush approach.</p> <p>Government model defines a relatively narrow range of suspected corrupt conduct. Limitations in Govt model on the Public Sector Integrity Division (PSID) in both the definition of corrupt conduct and the threshold for commencing an investigation.</p> <p>Senate model allows the National Integrity Commission broad discretion to make reports (including findings and recommendations) about corruption issues (in line</p>

¹⁷ https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/8f5f59a1-32bd-48b2-be73-b477b00ae225/&sid=0015

¹⁸ https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/8f5f59a1-32bd-48b2-be73-b477b00ae225/&sid=0020

¹⁹ https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/8f5f59a1-32bd-48b2-be73-b477b00ae225/&sid=0018

	<p>with ACLEI’s current powers). Under the Government’s model, the PSID ‘will not make findings of corruption at large’.</p> <p>The Senate model is complemented with a Parliamentary Standards Bill which addresses the responsibilities and accountabilities for parliamentarians, including providing clear pathways for investigation and resolution of serious corruption issues. Both models are silent about bribery, misuse of donations to parties and politicians etc. It is assumed the Senate model would allow for such investigations – although it may not provide sufficient ‘follow-the-money’ powers.</p>
Differences in resourcing proposed	<p>Senator Stoker: Greens resort to nitpicking about the \$104.5 million over the forward estimates and the approximately 93 staff allocated to it. With the \$150 million that they propose should be allocated to their National Integrity Commission, they don't bother even for a moment saying what the source of that funding will be. As usual, the money just comes from the ether with the Australian Greens.</p> <p>The Commonwealth Integrity Commission will receive a total of \$145.2 million in funding over its first three years, with \$2.2 million worth of funding in the 2019-20 year to reconstitute the Australian Commission for Law Enforcement Integrity as the CIC's law enforcement integrity division, and a rolling-in of ACLEI's existing budget of \$40.7 million.²⁰</p>
Power to investigate public entities and their boards	Senate model appears to have the powers to investigate public entities and their boards whereas the Govt model does not unless is given a referral from another agency.
Justice processes when making findings of corruption	Senate model allows NIC broad discretion to make reports (including findings and recommendations) about corruption issues (in line with ACLEI’s current powers). Under the Government’s model, the PSID ‘will not make findings of corruption at large’.
Whistleblower protection	Senate model establishes within the NIC a Whistleblower Protection Commissioner, whose functions would include receiving and investigating ‘disclosures of wrongdoing’ and providing ‘advice, assistance, guidance and support to persons and agencies who disclose wrongdoing’. The Government model is silent on this.
Right to silence and not self-incriminating	Senator Stoker: There is no consideration in this [Senate model] bill given to providing due process to innocent witnesses who are brought before a commission to contribute their accounts. The protections afforded by the traditional justice system, like the right to silence, are valued because of their rigour, not because of the ease with which they allow convictions to be secured. They serve as a check on the inherent imbalance of power between the individual and the state, ensuring that the freedom of an individual accused of a crime can be compromised only if a case is actually proven against them. ²¹

Comments/evaluation

In this response, we’ve outlined the key design features, the issues and risks, and the principles that should guide the new integrity body’s design. Application of good design principles from the concept development stage is crucial, as is a clear vision. Clearly defined roles and responsibilities will give the institution the best chance of meeting those stated objectives, as will a strong structure and wide scope. Both models are close on these design elements. There are, however, some differences.

²⁰ https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/8f5f59a1-32bd-48b2-be73-b477b00ae225/&sid=0018

²¹ https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/8f5f59a1-32bd-48b2-be73-b477b00ae225/&sid=0018

The new body needs the powers of a Royal Commission. The Government’s proposed model is well conceived with respect to its design and basic powers. The model, however, needs the powers of a standing Royal Commission, with discretion to hold Royal Commission-style hearings, subject to a public interest test. A well-functioning integrity commission with such functions should reduce the need for intermittent Royal Commissions on periodic scandals. It would also help maintain public confidence in our integrity processes; and achieve greater consistency between the commission’s work and the principles of our courts. The Hayne banking Royal Commission provides an excellent model for how investigative powers can be applied in the public spotlight for the public good.

The new body needs to have public hearings – subject to a public interest test. The ability to conduct hearings in public appears to be a major difference between the models. The need to balance openness and transparency with the right to be considered innocent until proven guilty and avoiding ‘show trials’ is a valid concern. This tension plays out in the debate about whether the new integrity body should have the power to hold public hearings.

Existing state and territory anti-corruption commissions are able to hold public inquiries or hearings if the relevant threshold is met. We note that the Senate Select Committee on a National Integrity Commission reported, ‘The effectiveness and use of public versus private hearings by state anti-corruption agencies, and whether or not an NIC should be empowered to hold public hearings were the subject of lengthy debate’ during its inquiry, but it did not make a recommendation on the matter.’²²

In accordance with legal principles, whereby our federal and other courts operate in the open with only limited exceptions (such as secret hearings when there are demonstrable national security issues at stake), the new NIC should be able to conduct public hearings – subject to a specified public interest test.

State integrity commissions provide good examples. In NSW, for the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry. Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the NSW Commission considers the following matters:

- the benefit of exposing to the public to, and making the public aware of, corrupt conduct
- the seriousness of the allegation or complaint being investigated
- any risk of undue prejudice to a person’s reputation (including prejudice that might arise from not holding an inquiry)
- whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.²³

²² https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2019/April/National_integrity_commission

²³ <https://www.legislation.nsw.gov.au/#/view/act/1988/35/part4/div3/sec31>

The new body needs to fit in explicitly with other integrity institutions and bodies. This includes practical referral powers (make and receive) vis a vis the ANAO, AFP and other organisations. It is in the ‘making room’ for the new body (and then providing it with sufficient and unique powers and functions to be effective) where we see divergence between the models. The Government’s proposed model limits investigations to a narrower range of suspected corrupt conduct compared to the Senate model.

The Senate model allows the NIC broad discretion to make reports (including findings and recommendations) about corruption issues (in line with ACLEI’s current powers). Under the Government’s model, the PSID ‘will not make findings of corruption at large’. The intention is to ensure justice processes are followed. We suggest somewhere in the middle, such as was in Labor’s previous proposal: that the body would ‘only be empowered to make findings of fact’; with ‘findings that could constitute criminal conduct’ to be referred to the AFP or the Commonwealth Director of Public Prosecutions.

We agree with the Government’s proposal that the CIC should not replace agencies’ own responsibility to prevent, detect, investigate and respond to internal misconduct and other integrity issues; including by educating staff and having in place relevant controls. The CIC should inform this work through its insight into whole-of-Commonwealth risks and best practice. We recommend that it be designed as a ‘higher court’, to allow itself to investigate and resolve issues that have not been satisfactorily addressed by the other entities. The default setting should be ‘go to another entity first where practicable’.

The new body needs to be explicitly subservient to Parliament. In order to keep the body on track and focused, we strongly suggest establishing a direct link of authority and reporting to parliament, much the same as with the auditor general. The Parliamentary Joint Committee on Intelligence and Security provides a suitable bipartisan committee to make appointment recommendations with respect to the new body, and to monitor, oversee and resolve issues of concern regarding the NIC.

The body needs wide powers, including power to ‘follow the money’ (piercing the corporate veil, and the donor veil) and to ‘follow the data’. This is crucial in the current digital era, and in the era of digital fraud.

The body needs to be well resourced. In light of the recent national financial stimulus (in the order of \$200 billion), the amounts being touted to resource the NIC appear modest, and some of the debates look like nit-picking, given the national dividend from greater public integrity. Adequate resourcing is essential, at a level that matches the body’s role and functions, and that gives it adequate certainty and independence. We would suggest committing ten years of funding, to be reviewed every five years to provide certainty.

In both models there are missed opportunities and unresolved design questions. These relate in particular to innovation in integrity frameworks and investigative tools; research into integrity best practice; advocacy and promulgation of integrity principles and conduct; establishing greater consistency in integrity frameworks and expectations; relationships with state-based integrity bodies; and the role of the media in the overall integrity system.

Both models include broader preventative and educative functions for the NIC. However, there is a lack of clarity about these roles, and this clarity should be provided. An effective integrity commission would feature:

- a strong investigative capability
- a broad power to initiate inquiries and investigations
- a strong focus on innovation in integrity tools, including the use of ‘big data’ and cognitive artificial intelligence in the detection and prevention of fraud and other breaches
- a research and engagement capability, so the body can partner with universities and integrity NGOs to innovate and to learn from the best around the world
- a strong advocacy role to encourage pro-integrity conduct and behaviours, e.g. encouraging and fostering greater adoption of open processes in government departments and agencies; this includes greater use of ‘radical transparency’ in policy development processes and grant programs
- a review, advocacy and direction role to ensure there is a high level of consistency in integrity guidance, frameworks and training across Australia’s public sectors, including for members of parliament, ministerial offices and public agency boards
- an explicit place for the free media and NGOs in the integrity system – seeing journalists and NGOs unequivocally as partners in integrity rather than as opponents or a problem to be addressed.

Conclusion

To summarise our response, we believe there is a sensible middle ground between the principal integrity commission models that have been put forward in the Senate and the House.

Such a middle ground model would:

- have the powers of a standing Royal Commission, with discretion to hold open, Royal Commission-style hearings, subject to a public interest test
- apply legal principles consistent with our courts
- be structurally subservient to the national parliament
- have wide and well-resourced investigative functions, ‘follow-the-money’ powers, as well as a research and engagement capability
- advocate for greater openness and innovation in the fight against fraud and corruption
- be designed explicitly to complement other accountability and oversight bodies and our overall public integrity architecture, including state-based corruption commissions, integrity NGOs, the free media and investigative journalism.

We suggest a new Senate Select Committee be tasked with coming back with a National Integrity Commission proposal that can receive bipartisan support.